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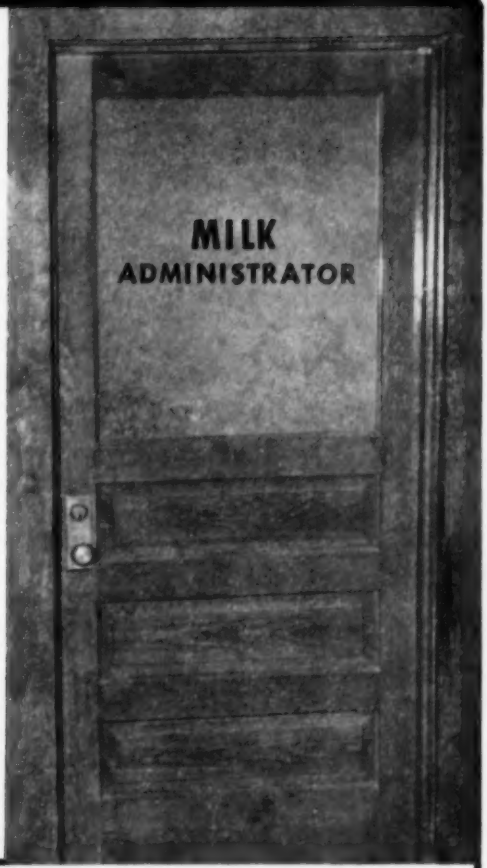
MILK CONTROL PROGRAMS *of the* NORTHEASTERN STATES

Part 2



by Leland Spencer and S. Kent Christensen

NORTHEAST REGIONAL PUBLICATION NO. 23

Foreword and Acknowledgments

This is the second and concluding part of the report on a regional study in which several agricultural experiment stations of the northeastern states and the Agricultural Marketing Service, United States Department of Agriculture participated. Part I, which dealt with the fixing of prices paid and charged by dealers, was published in 1954 as Bulletin 908 of the Cornell University Agricultural Experiment Station, also identified as Northeast Regional Publication No. 21. The study has been financed in part by funds made available under the Research and Marketing Act of 1946.

The State Agricultural Experiment Stations of New Jersey, New York, Pennsylvania, Vermont, and Virginia participated actively in the project, each one taking responsibility for study of the milk control program in its own state. The Agricultural Marketing Service of the United States Department of Agriculture also participated in the project through cooperation with the Virginia Polytechnic Institute. The Northeast Regional Dairy Marketing Technical Committee considered various means of getting a regional report prepared for publication. Finally, with the committee's approval, the task was assumed by Leland Spencer and S. Kent Christensen with the understanding that the report would be published by the Cornell University Agricultural Experiment Station.

The authors of this regional report wish to express their high appreciation of the valuable assistance they have received from members of the regional committee and from many others. They are especially indebted to C. W. Pierce of Pennsylvania State University, and M. C. Conner of Virginia Polytechnic Institute, who helped to prepare a preliminary outline for the regional report, and to Earl Warner of Ohio Wesleyan University, who prepared preliminary drafts of the manuscript sections on administration, legal issues, and enforcement.

Generous use has been made of the reports previously prepared concerning the milk control programs of the several states. A list of these reports is given on page 134 of Bulletin 908. A preliminary draft of the regional report was circulated to all members of the regional committee, to all state and federal milk control agencies in the Northeast, and to a number of economists, lawyers and executives of milk companies and milk producers' associations in the region. Many of the recipients responded generously to the request for criticisms and suggestions, with the result that the manuscript for Part II, like that for Part I, has been extensively revised and expanded.

The authors gratefully acknowledge the aid of all who have contributed directly or indirectly to the preparation of this report. At the same time, however, the authors themselves must assume full responsibility for the conclusions stated, as well as for any errors of fact or interpretation that may be found in the publication.

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MILK CONTROL PROGRAMS OF THE NORTHEASTERN STATES

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Part 2. Administrative and Legal Aspects, and Coordination of State and Federal Regulation

Leland Spencer* and S. Kent Christensen†

Administrative Organization

Nature of state milk control agencies

The milk control programs of the northeastern states are administered by agencies that differ widely in structure and in their relationship to other departments of the state governments. In 5 of the 10 states that have milk control laws, the milk control agencies are in, though not necessarily integrated with, the state departments of agriculture. In 2 states, namely Maine and Vermont, the milk control agencies are separate from the departments of agriculture, but in each instance the commissioner of agriculture is a member of the milk control board. In Connecticut, Pennsylvania, and Virginia, the milk control agencies are administered independently of the agricultural departments.

Some of the state milk control agencies function under the direction of a single official, a director or administrator, while others are headed by boards or commissions (table 1). Three states—Connecticut, New York, and New Jersey—have single directors or administrators. In Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Virginia,

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Table 1. **Administrative set-up of milk control agencies in 10 northeastern states, 1955**

State	Title of agency	Composition of the agency			Method of selecting chairman	Term of office (Years)	Qualifications of members	Executive officer of the agency
		Ex officio members	Other members appointed by	Total members				
Vermont	Milk Control Board	Commissioner of Agriculture	Governor	3	(*ex officio*) Commissioner of Agriculture	4	None specified	Chairman of Milk Control Board
Rhode Island	Milk Control Board	Director of Agriculture and Conservation, Director of Public Health	Governor with consent of Senate	5	Election by Board members	6	1 producer 1 dealer 1 consumer	Executive officer of Milk Control Board
New Hampshire	Division of Milk Control (Milk Control Board)	None	Governor with advice and consent of Council	3	Designated by Governor	3	No more than two members of the same political party	Chairman of Milk Control Board
Massachusetts	Division of Milk Control (Milk Control Commission)	None	Governor with advice of Council. Commission appoints director	3	Designated by Governor	6	1 producer 1 retail dealer 1 public represent. Chairman by training and experience	Director of Division of Milk Control
Maine	Milk Commission	Commissioner of Agriculture	Governor	6	Election by Board members	4	2 producers 1 dealer 1 producer-dealer 1 consumer —all residents of the state	Chairman of Milk Commission
Virginia	Milk Commission	None	Governor	3	Designated by Governor	Pleasure of the Governor	1 producer 1 dealer 1 consumer	Chairman of Milk Commission
Pennsylvania	Milk Control Commission	None	Governor with approval of Senate	3	Designated by Governor	6	Hold no other state or federal office. U. S. citizen	Chairman of Milk Control Commission
New York	Division of Milk Control	None	Governor appoints commissioner, who appoints director	1		Pleasure of appointing authority	None specified	Director of Division of Milk Control
New Jersey	Office of Milk Industry	None	Governor with advice and consent of Senate	1		During term of appointing governor	None specified	Director of Office of Milk Industry
Connecticut	Milk Administrator	None	Governor with consent of either Senate or House	1		4	Training and experience	Milk Administrator

the milk control agencies are headed by part-time boards or commissions. Only Pennsylvania has a full-time commission, officially known as the Pennsylvania Milk Control Commission. New York State has a Division of Milk Control in its Department of Agriculture and Markets. In New Jersey the agency is known as the "Office of Milk Industry", and in Connecticut as the "Milk Administrator".

Most of the milk control boards or commissions consist of 3 members, but those in Rhode Island and Maine are exceptions. In these 2 states the control agencies have 5 and 6 members, respectively. In Vermont and Maine, 2 of the 7 states with multiple-headed agencies, the laws provide that the commissioner of agriculture be an *ex officio* member. The Rhode Island law provides for 2 *ex officio* members: the director of agriculture and conservation and the director of public health. With these exceptions, the heads of the control agencies are appointed by the governors of the respective states. In New York the commissioner of agriculture and markets, and in Massachusetts the milk control commission, selects a director who supervises the work of the milk control agency. Vermont is the only state with a multiple-headed agency where the law specifically designates the chairman of the agency—*i.e.*, the commissioner of agriculture. The Maine and Rhode Island laws authorize the members of the control agencies to elect the chairman; in Massachusetts, New Hampshire, Pennsylvania, and Virginia, the governor is authorized to designate the chairman of the milk control agency.

The term of office for appointed milk control agency members ranges from 3 years in New Hampshire to 6 years in Pennsylvania and Rhode Island. Appointments in Virginia and New York can run for indefinite periods, however, since they are at the pleasure of the governor. If a new or reelected governor so desires, previously appointed members may continue to serve without reappointment.

The milk control laws in New York, New Jersey, and Vermont have no provisions as to the qualifications of members appointed to serve in the milk control agencies. In Maine and Massachusetts, members of the control agencies are required to be citizens of the state, and in Pennsylvania they must be United States citizens and hold no other state or federal jobs. In Massachusetts and Connecticut, the chairman of the board and the milk administrator must each be qualified by training and experience, while the New Hampshire law provides that no more than 2 members of the 3-man milk control board may be members of the same political party.

The laws in Maine, Massachusetts, Rhode Island, and Virginia differ from those of the other states in that they provide for representation of interested groups in their control agencies. The Massachusetts, Rhode Island, and Virginia laws call for the appointment of a producer, a dealer, and a consumer or public representative. The Maine law provides for the appointment of 2 producers, one dealer, one producer-dealer, and a consumer. The Virginia law requires that the consumer representative

have no affiliation whatsoever with the milk industry. In Connecticut, the milk control law provides for an advisory council, which is discussed later in this section (page 22).

The milk control officials of Connecticut, New York, and New Jersey are full-time employees, as are also the members of the Pennsylvania Milk Control Commission and the director of the Massachusetts Division of Milk Control. In the other 5 states, milk control activities are on a rather modest scale and the officials serve only part-time. In Massachusetts, members of the milk control commission receive relatively small annual salaries plus expenses; in the other 4 states, the part-time members of the milk control boards or commissions are paid on a *per diem* basis, plus expenses. The amount of the *per diem* is determined by the legislature in Vermont and by the governor and his council in Maine. In New Hampshire, Rhode Island, and Virginia, the *per diem* compensation is set by the milk control laws. The *ex officio* members of the control agencies in Maine, Vermont, and Rhode Island serve without additional compensation.

In each of the states except Virginia and New York, the administration of the milk control programs is handled by a central office in the state capital. In Virginia, the law provides for the creation of local boards, which function in each of the areas brought under regulation. Each local board is composed of 5 members: 2 producers supplying milk to the market, 2 distributors, and a public representative. The producer and distributor representatives are named by their respective groups. One of the producer representatives must be named by the producers' cooperative association operating in the market, and in markets where the producers' cooperative "handles the selling" of 50 per cent or more of the milk, the cooperative is given the right to name both producer representatives on the local milk board. No detailed instructions are provided for the selection of the distributor representative, but the law does provide that, if producer-distributors handle 50 per cent or more of the milk used in the market, the state milk commission shall determine the representation of the producers, producer-distributors, and distributors in a way that is fair to all parties.

The public representative on each of the local boards in Virginia is appointed by the state milk commission and holds office at the pleasure of the commission. He must be a person having no connection with the production and distribution of milk. By provision of law, he automatically becomes chairman of the local board. The local boards function primarily as administrative arms of the state commission and exercise only such powers as are delegated to them by the commission. Legally, the commission may delegate to the local board such of its powers as it sees fit for the purpose of carrying out the milk control programs in a particular market. The chairman of each local board is normally paid a salary varying from a small amount in some instances to more than a thousand

dollars a year in others. The other board members are paid on a *per diem* basis, plus expenses.

In New York the commissioner of agriculture and markets is authorized to appoint an administrator (and as many assistant administrators as may be necessary) to administer the terms of each marketing order. Persons who are appointed do not have to take a civil service examination.

In each of the 2 New York upstate markets brought under regulation after 1937, market administrators are employed and local offices are maintained for administrative purposes. The administrator of the milk control order for the New York market is appointed jointly by the New York State Commissioner of Agriculture and Markets and by the United States Secretary of Agriculture. In each instance, the market administrator is concerned only with the milk price orders. He has nothing to do with the other functions performed by the New York Division of Milk Control such as licensing, bonding, checking weights and tests of milk, checking product standards, and the like.

Size of milk control staffs and departmental organization

The size of milk control organization varies from state to state, and depends upon several factors. It is influenced by the number and size of markets in which prices are regulated, the number and variety of functions assigned to the milk control agency, and the extent of centralization or decentralization of activities. New York reported the largest number of milk control employees (108), while in Vermont the services pertaining to milk control were performed almost entirely by employees of the department of agriculture.

Only the 3 principal markets of New York State have price control orders, and for the largest of these a federal order also is in effect. Resale prices are not fixed in New York, but the Division of Milk Control is responsible for the enforcement of much milk industry legislation not directly related to price-fixing. Virginia has an extensive program of milk price regulation, with minimum retail and wholesale prices fixed in nearly all markets, but the major part of the work is left to local boards and there is relatively little auditing of milk dealers' purchases and uses of milk. Consequently, the Virginia Milk Commission has only a small staff—in 1955, besides the 3 part-time members of the commission, 7 persons were employed full-time, including a secretary, auditors, inspectors, and stenographic assistants.

In 1955 New Hampshire had, in addition to the 3 part-time board members, 3 full-time employees in the office and one in the field. Obviously, there was not much opportunity for specialization. Maine employed 5 persons full-time; an executive secretary was in charge of the office and the field work, 2 persons were classified as field examiners, and were primarily concerned with auditing, and 2 women were employed to do

secretarial and general office work.

The number of full-time employees of the several state milk control agencies in the Northeast in 1955 was as follows:

Vermont	none	New Jersey	30
New Hampshire	4	Massachusetts	31
Maine	5	Connecticut	35
Virginia	7	Pennsylvania	71*
Rhode Island	13	New York	108†

*Includes 42 employees in six district offices.
†Includes employees in the market administrators' offices at Buffalo and Rochester. Employees of the federal-state market administrator's office in New York are not included.

The 31 full-time employees of the Massachusetts Milk Control Commission were assigned to various duties as follows:

Director and secretary	2
Inspection of records	8
Investigation	3
Enforcement	2
Butterfat-testing	4
Office	6
Research and statistics	5
Hearings	1
Total	31

With more than double the number of staff positions, the Pennsylvania Milk Control Commission has only 3 basic departments, or bureaus: administrative, accounts and statistics (research bureau), and enforcement (audits and investigations). The bureau of enforcement does the auditing, conducts investigations, administers the butterfat-testing laws, issues licenses to and collects bonds from dealers, and, in general, enforces the act.

The Connecticut Milk Administrator's office is divided into 5 sections, as follows: administration, research and statistics, auditing, licensing and enforcement, and business management.

The New York State Division of Milk Control (in the Department of Agriculture and Markets) has 4 main sections, as follows: licensing, auditing, investigation, and hearings. In addition, a filing section serves each of the 4 main sections. Statistical work is not organized in a separate unit, but is carried on by statistical clerks in the division, who work directly with the Bureau of Statistics of the Department of Agriculture and Markets in developing statistical information used by the division. Local administrative offices are maintained for the Niagara Frontier and Rochester markets.

Relation of milk control agencies to other departments

Most of the original state milk control agencies were multimembered boards that had little if any direct affiliation with previously established

state departments. There is a tendency, long observed in government, to create a new and independent agency for the performance of any newly established function. Besides, in this instance, it was generally believed that the regulation of milk prices would be only a temporary activity. The temporary and emergency nature of most of the original milk control laws possibly justified the view that their administration should be entrusted to a separate agency especially devised for that purpose. Moreover, there was a natural reluctance to place the broad powers given to the original milk control agencies in the hands of state officials who were burdened with other duties. It is not unlikely that some of the state departments of agriculture preferred not to be burdened with a function that was one of economic regulation primarily and might well lead to intense controversy.[1]

In some states, milk control boards were established within the departments of agriculture for general administrative and budgetary purposes, but were allowed independence of action with respect to their regulatory and rate-making functions.[2]

The current relation between the milk control agencies and other departments of the state governments varies a great deal from state to state. During the twenty years in which the milk control programs have been evolving, however, there has been a tendency to give state agricultural departments more authority over the regulation of milk prices. The laws in New Hampshire, Massachusetts, Rhode Island, New York, and New Jersey provide for a milk control division, or office, in the department of agriculture. There are, however, marked differences in the actual relation of milk control to the departments of agriculture in these states.

In New York, the powers and duties of milk control are vested in the department of agriculture, through the commissioner of agriculture and markets. Such powers and duties are exercised and performed by and through the division of milk control. The commissioner is authorized to delegate his powers, or assign any of his duties, to the director of the division of milk control, whom he appoints. As explained elsewhere in this report, the New York State Division of Milk Control is responsible for administering all dairy industry legislation except the frozen desserts law and sanitary control of market milk.

In contrast, the milk control agencies in New Hampshire, Massachusetts, and Rhode Island are under the supervision of milk control boards or a commission whose members are appointed by the governor. Similarly, in New Jersey the Office of Milk Industry is under the immediate supervision of a director appointed by the governor. The lines of authority are not clear, but, in general, the board, commission, or director, as the case

[1]The original milk control laws of California and Wisconsin placed the new function in the state department of agriculture. The Wisconsin law is no longer in effect, but California has consistently administered milk control in its department of agriculture.

[2]The Massachusetts and New York milk control boards were created "within" the state departments of agriculture, to meet the requirement that not more than 20 separate departments be created in either of the state governments.

may be, rather than the head of the department of agriculture, is vested with the power and authority to administer the milk control programs.

The Rhode Island law provides that the milk control board "...shall function as a unit independent of the director [of agriculture and conservation] and not subject to his jurisdiction". The director, however, serves as an *ex officio* member of the milk control board and the board has always elected him as chairman. In practice, the executive officer of the board signs and certifies all documents. He was given that authority by the director of agriculture when the milk control agency was placed in the department of agriculture in 1939.

The New Jersey law states that the secretary of agriculture "shall provide the Office of Milk Industry with such clerical, technical and other personnel as he shall deem necessary, after consultation with the director, ...[and that] the secretary of agriculture shall fix the compensation of persons thus assigned to the office of milk industry within the limits of the appropriation therefor". The law states further, however, that the director of the Office of Milk Industry has the power to prescribe the duties of all persons assigned to his office. Moveover, the director is appointed by the governor rather than by the secretary of agriculture. In another section, the law directs that all records and property of the milk control board, which was independent until 1948, be transferred to the department of agriculture. At the same time it was provided that the functions, powers, duties, records, and property of the current director be transferred to and vested in the Office of Milk Industry.

In New Hampshire, the milk control board was made a part of the department of agriculture under a reorganization act passed in 1950. It is reported, however, that the reorganization did not in any way affect the board's independence in exercising its statutory powers and duties. It appears to be attached to the department of agriculture for budgetary and personnel purposes only.[3]

The relations between the Massachusetts Department of Agriculture and the milk control commission are very close from a legal standpoint but less so in practical operation. The statute says: "...there shall be in the department [of agriculture] a division of milk control, under the control and supervision of a milk control commission". The members of the commission are appointed by the governor for 6-year terms. It is further provided that the commission shall appoint the director of the division of milk control. Thus, the milk control division in the department of agriculture has a great deal of independence.

In Maine and Vermont as well as in Rhode Island the head of the department of agriculture acts as an *ex officio* member of the milk control board. In Vermont the commissioner of agriculture, by law, serves as

[3]Carpenter, Park. Proceedings of the 14th Annual Meeting of the International Association of Milk Control Agencies. Appendix, p. 9. 1950.

chairman of the board and, as indicated above, the board in Rhode Island has always elected the commissioner of agriculture as chairman. Since the Vermont board has no full-time employees, all its clerical work is done by the office of the commissioner of agriculture.

In Connecticut, Pennsylvania, and Virginia, the control agencies have no legal or *ex officio* relations with other departments. The Connecticut and Virginia laws state that legal services and the services of other experts shall be performed as far as is reasonably possible by other agencies in the state government.[4] With the exception of some legal service, however, the milk control agencies have not as a rule called upon other state agencies for aid or services.

In most of the states certain functions closely related to milk control are assigned to other agencies of the state governments, particularly the department of agriculture. Such functions are bonding, checking weights and tests, licensing of certain dairy plant personnel, and checking of standards and adulterations. The need to coordinate these functions with the milk control programs has given rise to some formal or informal relations between the departments of agriculture and the milk control agencies. In Connecticut, for example, the department of agriculture does some of the butterfat testing but provides the milk administrator with a report of its findings. The administrator uses this report in computing prices to be paid producers whose milk is so tested.

Health protection is another important area of state functions in which there is some relation between milk control agencies and other departments. Although the laws of some states require that the milk control agency insure an adequate supply of pure milk, they also quite commonly make it very clear to the milk control agencies that they are not to participate directly in milk sanitation work. For example, Section 258–j of the New York milk control act states specifically that the Act does not alter or repeal any laws in force that relate to the board or department of health of the city of New York or to the city's sanitary code. This section also provides, however, that "no health officer of any county, city or village . . . shall hereafter approve any premises on which milk is produced or any plant in which milk is handled or authorize the shipment of milk from such premises or plant for sale or use within this state without first satisfying the commissioner [of agriculture and markets] that such proposed added milk supply is reasonably needed for such municipality, will not deprive another municipality of a supply, present or future, more conveniently related to it, and that such supply can be inspected and kept under inspection without undue expense".

In Massachusetts, the chairman of the milk control commission serves as a member of a so-called "milk regulation board". This board is entirely

[4]The agencies are specified in Virginia: the Department of Agriculture and Immigration and the Virginia Agricultural Extension Division of the Virginia Agricultural Experiment Station.

ex officio, and it includes, in addition to the milk commission chairman, the commissioner of agriculture, the commissioner of public health, and the attorney general. It is empowered, after notice and hearing, to promulgate rules pertaining to the sanitation, transportation, packaging, and handling of milk, including minimum requirements for dairy farm inspection. It has issued detailed regulations entitled *Milk Plant Regulations, Milk Transportation Regulation, and Regulations Relative to Establishments for the Pasteurization of Milk Outside the Commonwealth.*

Types of administrative organization

The state milk control agencies of the northeastern states have 4 different types of administrative organization, as follows:

Part-time board with no administrative officer	Maine New Hampshire Vermont Virginia
Part-time board with an administrative officer	Massachusetts Rhode Island
Full-time commission	Pennsylvania
Single administrator with full authority	Connecticut New York New Jersey

New Jersey formerly represented a fifth type of organization—an administrative officer with an appellate board.

Boards and commissions. Experts in administration have long recognized the advantage of having a board or commission to perform quasi-legislative or quasi-judicial functions. Since milk-price policy determination is probably the most essential function of a milk control agency, the reasons for creating a multimembered agency are readily seen. The functions these agencies perform are based on deliberation and the presentation of differing points of view. It is not absolutely essential to have more than one head for these functions, but it is helpful. An agency with quasi-legislative or quasi-judicial functions that has a single administrator might attempt to solve problems in a meeting of the head of the department with two or more of his division chiefs. This is in some degree objectionable, since the judgment of an expert administrator is not always as objective as it should be when persons accused of violations are to be dealt with.

Boards are also valuable because there can be a continuity of policy if terms are long and overlapping, and because board members are likely to be truly interested, since in most instances, they serve for very small pay. In most states there is also a high prestige value for the individuals appointed to such boards. Devoted service may thus often be obtained at low cost.

Another advantage claimed for the multimembered type of milk control agency is its value as an instrument of education for those affected by a milk control program. For example, a representative of a consumers' organization serving on a board has an unusual opportunity to acquaint consumers with the agency's work and with dairy industry problems in general.

In addition to these advantages, there are some that may result from the representation of group interests on such bodies:

1. Policies can be worked out with full understanding of the preferences of those most directly affected, and as a result may be more realistic.
2. Participating parties are more informed about the points of view of other parties and of the regulatory agency.
3. Policies evolved in this manner are more easily enforced.
4. The procedure is more democratic than when action is taken by a single official, and decisions are less likely to be capricious or arbitrary.[5] A multimember body serves as a check against the action of one person who might be incapable and harm the industry.

Whether a board or other multimembered agency tends to be less partisan than an individual administrator depends on local circumstances. As mentioned earlier, only one law presently in effect mentions political affiliation in connection with qualifications for board membership. In New Hampshire, not more than 2 members of the same political party may serve on the 3-member board.[6] In states where the governor has only a 2-year term, and where partisanship strongly influences administration, a board may serve as something of a barrier to undue partisan influence.

Multimembered boards or commissions also have some serious disadvantages. Competitors of a board member representing distributors have expressed concern over his opportunity to obtain confidential information about their affairs, or to influence regulations favorable to his particular type of business.

The general rule against delegation of legislative power by state legislatures does not prevent a considerable delegation of quasi-legislative power. Thus, important policy decisions are made by milk control authorities, and much criticism is based on the fact that certain interest groups (producers and dealers) actually make these policies through their representatives on the multimembered control agencies. There is a tendency for producer and dealer representatives to "gang up" in setting high consumer prices and splitting the premium between producers and dealers. It would appear that practically all the advantages of a milk control agency made up of representatives of interested groups can be gained by having an advisory board (see pages 21–23).

[5] *See* White, Leonard D. Introduction to the study of public administration, p. 92. 1939.
[6] The Ohio Milk Commission (1933–35) had 4 members, not more than 2 of whom were to belong to the same political party.

The quasi-judicial and quasi-legislative functions of milk control agencies should preclude the representation of any partisan interests. No one should represent any particular group; all members should represent the public interest. However, even in those states where the laws do not provide for the representation of producer and dealer groups, representatives of these groups are quite commonly appointed to the agencies.

In states where representatives of interest groups serve on milk control boards, groups already represented and some not originally represented have pressed for additional representation. When a board has representatives of producer, producer-distributor, distributor, and consumer groups, it is quite natural for storekeepers to seek representation. This question was raised in Georgia in 1950, and in Maine the retail grocers made an effort in 1949 to obtain representation on the milk commission. Recent changes in the Florida Milk Control Law are evidence of the success of such pressures. Upon recommendation of the governor, the Florida Milk Commission was changed to provide for 3 consumer representatives rather than one. In Maine the legislature added a consumer member to the milk commission in 1951.

The question may properly be raised: "If 3 or 4 groups are represented, why not more?" Several industry groups, such as restaurant associations and labor unions, might also seek representation. When consumer representation was proposed in Maine, its opponents argued that the commissioner of agriculture, as an *ex officio* representative of the public on the commission, was enough representation for consumers. The answer to this argument was that it was not realistic, that the commissioner of agriculture came nearer to representing producers than consumers.

The lack of a more widespread acceptance in milk control bodies of representation by interest groups, its discontinuance in certain instances, and the intense legislative conflicts over it in others indicate serious doubts as to its practicability.[7]

A board has difficulty in serving as an administrative body unless some arrangement is made for an individual to execute the administrative responsibilities. Policy determination and advisory and appellate functions are activities to which a board may be well adapted, but day-to-day administration such as directing personnel, answering complaints, supervising investigations, managing an office, or answering mail, are duties best performed by a single administrator and a staff that is responsible to him.

This situation is sometimes met by designating the chairman as a full-time administrative officer. This device has not, however, received wide acceptance in the milk control field, and there is an apparent tendency

[7]A board has to compromise, and when a board member represents a particular group he tends to represent it without compromise. This attitude may cause the board to act like a "hung" jury, with the recalcitrant member able to stop proceedings until his demands are met. Each member comes to realize that each of the other members can exercise this right.

to change to some other type of executive officer. There have been some practical objections to having the officer in charge of administration serve as a voting member of the board.[8] The preferable alternative seems to be for the board or commission to have an executive "officer" or "secretary", as in Rhode Island or in Alabama, or a director, as in Massachusetts. Maine and New Hampshire have recently (1953) established the position of "executive secretary". The Vermont law provides for a similar office, but the board has not employed anyone to fill it. Such an official is then an employee of the board, occupying a position something like that of the general manager of a corporation or of the city manager of a municipality. These officials find it possible to influence the members of the board on policy issues when they feel strongly enough about them. They may do this by expressing their opinion to the board either upon their own initiative or upon the request of the board. Until 1953 the Massachusetts Milk Control Board—now a commission—had both a full-time chairman and a "director", an arrangement which does not appear to be advisable. The chairman on some occasions felt the necessity of finding something to do and consequently became active in administration. The agency thus had 2 administrative heads. Such an arrangement is likely to result in personal friction as well as inefficiency.

Administration by an executive secretary or other officer apparently has some advantages over administration by a chairman. If partisanship creeps in, it is more likely to affect the appointment of a board chairman than that of an executive secretary. The secretary seems more likely to be an expert with something like guaranteed tenure, and he therefore has qualities important for effectiveness in office. In Massachusetts, where both a director and a chairman were provided, the position of director was much more stable than that of chairman. The present executive officer of the milk control board in Rhode Island and the present director of milk control in New York have held these positions from the beginning of milk control in these states.

In certain smaller, less expensively operated agencies, overall administration has been delegated to a part-time chairman. These positions seem to have considerable stability and, no doubt, a considerable degree of expertness has been attained through experience.

One means of overcoming the innate administrative weaknesses of boards seems to be a provision that the board, not the governor, shall have power to appoint an executive officer. Such an officer might well be selected according to his civil service merit, as in Rhode Island, or through some other procedure guaranteeing fitness for the position. It appears unnecessary and inadvisable to require that such an officer be a resident of the state at the time of his appointment.

[8] A recent amendment to the Florida law removed the administrative officer from his position as a voting member.

One form of multimembered agency used frequently for regulatory purposes by both federal and state governments is the full-time commission. Only one example exists in the milk control field—the Pennsylvania Milk Control Commission.[9] This 3-member agency actually functioned as a 2-member body for most of the period 1939–1949. The difficulty of delegating administrative responsibility in such an agency has long been recognized. The Pennsylvania Commission has understood this and has set up a so-called administrative department to handle legal, fiscal, and general problems under the direct jurisdiction of the commissioners and the secretary of the commission. The act directs that the commission may prescribe for the secretary such duties as it may see fit. The delegation of important administrative functions to the secretary does not seem to have been favored by the commission. Lack of cooperation among members of the commission at times has magnified the ill effects of a faulty administrative structure. Much depends upon the force and sagacity of the chairman. To borrow a phrase from James M. Byrnes, it helps in a 3-member agency to have "one Edgar Bergen and two Charlie McCarthys".

Single administrators. The history of the state milk control agencies shows a trend toward the vesting of the entire responsibility in a single administrative officer and away from administration by boards or commissions. There are several reasons for this. In the first place, milk control has acquired a status of permanency, and is no longer a temporary emergency function. Policies have become more settled and less experimental. At first nearly everyone associated with milk control was, in a very real sense, an amateur. Now there are many persons with expert knowledge in charge of the program or in a position to influence it in one way or another. While policy issues and questions of theory are still important, a larger proportion of the activity may now be regarded to be "direct performance of work".[10]

Another factor in the trend toward a single administrator probably has been the necessity for more efficient and less costly operations. This has influenced the movement to incorporate milk control into the regular programs of the state departments of agriculture. In 1953, the Chesterman Committee in Pennsylvania recommended that the milk control commission's functions be transferred to the state agricultural department and that the commission be abolished. The legislature did not, however, accept this recommendation.

Advantages of the single-administrator type of agency are expertness and continuity in office, although these depend also on the political traditions of a state. In a state that has a strong tradition of nonpartisanship in its higher appointive offices, this may be a reason for supporting the establishment of an agency of the single-administrator type, or a board

[9]As indicated previously, other agencies called "commissions" (in Maine, Massachusetts, Virginia, and Florida) are actually part-time boards similar to those of Rhode Island and Alabama.
[10]White, Leonard D. Introduction to the study of public administration, pp. 89–92. 1939.

with an executive officer. Experience with a single administrator in Connecticut and with the board and executive officer in Rhode Island shows that both types may result in long tenure of expert personnel. The establishment of a single administrator with some permanence would not be a likely possibility in a state where the higher administrative officers usually change when a change occurs in the governor's office. Permanence and expertness, moreover, depend to some extent on the degree to which the dairy industry is well organized in a state and on the consequent influence, or lack of it, that industry rather than partisan politics has in the selection of personnel.

An obvious advantage of a single administrator rather than a board or commission is that the administrative responsibility is more definitely fixed. There is little doubt where credit is due or where blame should be placed, which reduces the possible criticism that the concentration of so much power in the hands of a single administrator is undesirable. Experience in the states where there are single administrators has been sufficiently satisfactory to justify this type of administrative set-up.

Advisory groups. Most of the advantages of a multimembered administrative agency can be obtained, without the disadvantages, by having a single administrator with an advisory board of some sort.

From 1934 to 1937, the New York law provided for an advisory committee. The commissioner of agriculture and markets was required, either at his own discretion or when requested to do so by a majority of the advisory committee, to call a meeting and confer with the committee about orders regulating the pricing and handling of milk. An affirmative vote of a majority of the committee was required before orders could be issued for market-wide equalization.

The law stipulated that the committee should consist of 11 to 15 members. The commissioner was authorized to select not more than 2 members from a list of 5 nominated by each of 5 specified dairy industry groups. He was authorized to appoint additional committee members, up to the limit of 15, who in his judgment would most fairly represent the public interest. The president of the New York State Agricultural Society was made an *ex officio* member.

The provision for an advisory committee was not included in the new milk control law which was enacted by the New York legislature in 1937. Instead the new law provides for producers' bargaining agencies and distributors' bargaining agencies. These are not advisory groups in the usual sense, but they do constitute a means of reflecting to the commissioner the views of their constituents.

The New York law authorizes the creation of milk producers' and milk distributors' bargaining agencies in the various production and marketing areas of the State. A producers' bargaining agency must be composed of 2 or more cooperatives and represent at least 35 per cent of the producers

supplying a market. The purpose of a producers' bargaining agency is to negotiate marketing agreements with dealers or "... the basis of orders in the respective marketing areas for presentation to the commissioner for his consideration and approval...." Both the producers' and the distributors' bargaining agencies may appear before and negotiate with the commissioner about marketing agreements worked out between these 2 agencies, or about the terms of marketing orders proposed by the producers' bargaining agency.

The commissioner of agriculture and markets in New York may not call a hearing to consider a price-fixing order or a change in the order for a marketing area unless requested to do so by the milk producers' bargaining agency for that market. Furthermore, he may not put a proposed order, or amended order, into effect until it is approved in a referendum by two-thirds of the producers supplying the market.

In Connecticut the law provides for an advisory group called the Connecticut Wholesale Milk Producers' Council. The statute creating this council provides that one member is to be elected annually from each county for a 3-year term. There are 8 counties and, therefore, 24 members of the council. Annual county meetings are held, attended by milk producers, the milk administrator, and the dairy economist of the University of Connecticut. The duties of the council include the investigation, at the request of the administrator, of problems concerning the production, transportation, and marketing of milk. Expenses of the council, up to $2500 a year, are paid through the milk administrator's office.

The council meets regularly on the fourth Tuesday of each month and sometimes holds special meetings. An advisory committee, made up of representatives of producers, the University of Connecticut, and state regulatory agencies, is also invited to each meeting. A similar unofficial advisory group functioned in Connecticut at the request of the milk administrator from 1935 to 1942 and was obviously a forerunner of the Connecticut Wholesale Milk Producers' Council.

In New Jersey, where no officially established advisory body now exists, a privately organized group—the New Jersey Dairymen's Council—serves in this capacity. This council holds regular monthly meetings and reviews all aspects of the welfare of milk producers in the State. Its sessions are attended not only by representatives of milk producers' organizations, but also by marketing specialists from the New Jersey College of Agriculture and representatives of the Office of Milk Industry.

Advisory groups are also used in states with multimembered administrative agencies. An unofficial advisory committee has functioned in Pennsylvania since 1945. It is composed of 14 milk dealers and a similar number of producer representatives. The secretary of agriculture is an *ex officio* member. This committee meets once a year to discuss and make recommendations to the commission on milk control regulations and problems. There is an executive committee which may be called into

session more often to discuss timely questions.[11]

Local advisory committees have also often been used. When the Pennsylvania Milk Control Act was first passed in 1934, local committees composed of 2 members—one producer and one dealer—that were to investigate local conditions and to prepare producers and dealers for future hearings were planned. As a result of consumer criticism, this advisory plan was dropped after being in use for about a year.[11] The local control boards in Virginia perform somewhat the same function as did early local committees in Pennsylvania. In New Jersey, local committees for supervision of the norm and excess plan functioned officially from 1936 to 1949 and unofficially after that time.

The need for local committees seems to have been widely recognized in the early years of state milk control. The Indiana law, effective from 1935 until 1941, provided that representatives of producers and distributors be selected by the board to make recommendations to the board concerning rules and regulations and to assist in the enforcement of the act. The members served without compensation.

The California Milk Control law authorizes the director of agriculture to appoint a 7-member producer committee in each milk control area to assist and advise on producer pricing. It also authorizes the appointment of a 9-member committee in each area to assist and advise on resale pricing. The latter committee is made up of 4 distributors, 1 producer-distributor, 2 retail storekeepers, 1 restaurant operator, and 1 consumer. If recommended by a majority of this group, the director may also appoint a representative of the labor union which bargains for the plant employees. Alabama has no legal provision for local boards, but boards have functioned informally in some markets.[12]

Appellate boards. Appellate boards have been rare in state milk control. The director of milk control in New Jersey served from 1941 to 1948 in conjunction with a board to which an appeal from a ruling of the director might be taken. The board overruled the director often enough to reveal power of some significance. A striking example occurred in 1941–42. Upon the advice of a 6-member consumers' advisory committee, the director of milk control issued Order No. 42–16 on May 1, 1942, increasing the store differential from one cent to two cents a quart. Thereupon, the order was "appealed and fought most bitterly before the milk control board".[13] The struggle was carried on by organized labor and by subdealers who claimed they would be crowded out of the store milk business. The control board modified the director's order, reducing the store differential to 1.5 cents per quart. This appellate board was discontinued in 1948 when the control agency was transferred to the department of agriculture.

[11]Cook, Lewis Townsend. Development and operation of Pennsylvania milk control, p. 16. Thesis for the degree of M.S. Pa. State Coll. 1951.
[12]Rada and DeLoach. An analysis of state laws designed to effect economic control of the market milk industry, p. 24. Ore. State Coll. Agr. 1941.
[13]Report of the Director of Milk Control (New Jersey), pp. 25–26. July 31, 1942.

Proposals of state administrative reorganization commissions

Some of the northeastern states have had commissions on administrative reorganization, or so-called "little Hoover commissions" in the period since World War II. These agencies have had as a chief objective the achievement of greater economy and efficiency in the operations of state government and, toward that end, have made recommendations affecting the status of some of the existing milk control agencies. A noteworthy example occurred in Connecticut in 1949–50. In accord with usual procedure, outside experts were called upon to survey the existing administrative mechanism, including the office of the milk administrator.[14]

The independent status of the milk administrator was noted, and the opinion expressed that this isolation tended to prevent the administrator "from dealing with fundamental conditions relating to the welfare of the milk industry and the public's interest in a stable, pure, and inexpensive supply of milk". The independence of this agency was also regarded as bad because "it continues the diffusion of executive responsibility now characteristic of Connecticut administration [and] forces the governor to deal with yet another agency head in a rather narrowly specialized program". It was suggested that the office of the milk administrator be made a part of the secretariat of agriculture and natural resources. According to the report: "Participation of the milk administrator in the work of the secretariat for agriculture and resources would also help to remind the administrator that his primary responsibility is to the public rather than to a special interest". The report did not assert that there had been undue preoccupation with the special interest, but expressed concern that an independent status might lead to such a preoccupation in the future.

This survey and its recommendation suggest an important aspect of the administrative reorganization program: concentration of power and responsibility by an integration of functions. As a general principle, it is best to have the state's business organized in a few departments, each dealing with closely related matters. Nevertheless, it may not be advisable to abolish an existing independent agency with very limited functions if it is doing a good job.[15]

A similar proposal for integration was made in Rhode Island in 1952. After reviewing the history of the milk control board, the reorganization commission said:

> The administrative act of 1939 made it clear that the milk control board was to be a "unit independent of the director [of agriculture] and not subject to his jurisdiction". Yet the appropriation act of each succeeding year, as exemplified by the act of 1951,

[14]Bernstein, Marver H. Department of the Milk Administrator, Regulative Agencies, Part II (Connecticut), pp. 80–89. November 21, 1949.

[15]*See* Coker, F. W. Dogmas of administrative reform as exemplified in the recent reorganization of Ohio. Amer. Pol. Sci. Rev. August 1922.

states "The various receipts appropriated by this section shall be made available for such purposes...as the director of agriculture shall specify".

The resulting confusion, the report states, could be clarified neither by the department director nor by the executive officer of the milk control board. "Neither was able to explain the working relation of the board with the department, or the extent of his own authority, except in general terms". Although the milk control board is considered to be independent of the department of agriculture, the director of the department serves as chairman of the board.

The specific proposals for reforms in the administrative structure of Rhode Island were as follows: (1) that the functions of the milk control board be brought within the jurisdiction of the department of agriculture and conservation, and (2) that the executive officer be made responsible to one person, the director of agriculture. These proposals are based on the same theory as the proposals in Connecticut. The Rhode Island proposal stated:

> After long experience, the trend in public administration today is away from the independent agency, the feeling being that integration and centralization focalize responsibility in the agency head. And this is desirable.

The report is not, however, entirely opposed to the use of a board. It proposes an appeal board of three members "from which redress from the administrator's rulings may be sought. Such a board would provide assurance to the milk industry that one-man rule would not be dictatorial in nature".

An interesting feature of the Rhode Island proposal is that it suggests that the appeal board members represent the same interests as the present board members, and that the incumbents, other than the *ex officio* members, continue as members of the appeals board. The suggestion that *ex officio* membership be abolished appears to be sound even though in some of the smaller states, the *ex officio* members have been among the best informed and most helpful. *Ex officio* members of government agencies have often had difficulty, particularly in the larger states, in being well enough informed to participate effectively, owing to the pressure of other duties.[16]

Further proposals of the Rhode Island study had to do with the internal organization of the control agency. A deputy chief of the milk control division was suggested, in addition to an expanded staff of field examiners and a statistical research section, which was considered to be the most important of the three. It was stated that much of the current statistical work was being done by the administrative officer, who could not devote as much time as necessary because of the pressure of other duties.

[16]One state governor who was supposed to serve as *ex officio* member of many agencies disclosed his estimate of this device by facetiously defining *ex officio* as meaning "under false pretenses".

New Hampshire is a third state in which an administrative reorganization program has been proposed in recent years. There Governor Sherman Adams inspired a study which, as in Connecticut, marshalled not only the resources of the state university but also experts from Princeton University.[17] A proposal by the study group to place milk control under the commissioner of agriculture was rejected by the legislature in favor of merely attaching the milk control board to the agricultural department for budgetary and personnel purposes. A reorganization act passed May 17, 1950, converted the milk control board and staff into the division of milk control in the department of agriculture. This reorganization did not, however, in any way affect the board's independent exercise of its statutory powers and duties.[18]

The New Jersey state administration was reorganized in 1948. Until that year the milk control agency had been separate and independent. In 1948, however, along with a major reorganization of the administrative structure of the State, the milk control function was assigned to the Office of Milk Industry under the New Jersey Department of Agriculture. As explained earlier, however, this office still maintains a certain degree of independence, since the governor appoints the director.

In Virginia, the Burch Commission on reorganization of state government proposed a "committee on milk control" under the commissioner of agriculture. This committee would have been granted power to hold hearings and establish regulations. Powers of supervision and enforcement would have been placed directly in the hands of the commissioner of agriculture. Industry opposition, led by the Virginia Dairy Products' Association (dealers) and the Virginia Dairymen's Association (producers), defeated the proposal in the legislature. The theoretical argument in support of the proposal was that supervision and enforcement should be separated from the quasi-legislative and quasi-judicial functions exercised by the commission. The industry's preference for a single, separate agency prevailed.[19]

Financing of Milk Control

Methods of financing

Several methods of financing milk control programs have been used by the 10 states in this study. The methods include: (1) legislative appropriation from the general fund, (2) license and penalty fees collected by the agency, (3) assessments on dealers and producers based upon the volume

[17]The New Hampshire Reorganization Commission. Reports to Governor Sherman Adams. 1950.
[18]Proceedings of the 14th Annual Meeting of the International Association of Milk Control Agencies. Appendix, p. 9. 1950.
[19]Conner, M. C. The milk market control law in Virginia. Va. Agr. Exp. Sta. Bul. 444, p. 7. 1951.

of milk handled or produced for the market, and (4) various combinations of the first 3 methods listed. The methods used by the individual states in 1955 are shown in table 2.

Table 2. **Methods of financing milk control programs, 10 northeastern states, 1955**

State	Method of financing*		
	Legislative appropriations	License fee	Assessments
Virginia	..	..	X
Maine	..	X	X
Vermont	..	X	X
Rhode Island	..	X†	X
Connecticut	..	X	X
Pennsylvania	X	X	..
New Jersey	X	0	..
New York	X	0	X‡
Massachusetts	X	0	0
New Hampshire	X	0	..

*The symbol X denotes the direct method of financing. The symbol 0 indicates that license fees or assessments approximately equal to the legislative appropriation are collected by the milk control agency and turned over to the state treasury.

†Less than $25 a year.

‡Used to finance the administration of milk marketing orders only.

It will be noted that the milk control activities of 5 states are financed in whole or in part by direct legislative appropriations. In 3 of these states, however,—New Hampshire, Massachusetts, and New York—license fees or assessments, which usually are slightly greater than the legislative appropriations, are collected and turned into the general fund by the milk control agencies. License fees collected by the agencies in Maine, Vermont, Connecticut, Rhode Island, and Pennsylvania are made available to the agencies and, in the last 3 states, are an important source of funds for the milk control programs.

In all the states except New Hampshire, New Jersey, and Pennsylvania, milk dealers are required to pay monthly assessments based on the quantity of milk handled.[29] As a rule, the dealers are authorized to deduct all or a part of the assessment from payments due producers. The assessments collected in all states except Massachusetts are either kept in a private account by the milk control agency or credited to the account of the agency by the state treasurer.

In Virginia the state milk commission as well as the local milk control boards are financed exclusively by assessments on milk handled in the markets under control. The maximum assessment is 4 cents a hundredweight—2 cents for the state milk commission and 2 cents for the support of the local boards. The local boards collect both assessments from the distributors, who are permitted to divide the burden equally with their producers. With few exceptions, the local boards have collected the full 2 cents available to them. In the earlier years of milk control, the state commission assessed the local boards the maximum of 2 cents a hundredweight, but this resulted in the accumulation of a rather large reserve. The reserve was built up especially fast during the war when milk control activities were curtailed because of the manpower shortage. As a consequence, the rate was eventually lowered to one cent a hundredweight in July 1946. This rate of assessment has been continued to the present and

[29]In New York State, assessments are levied only upon dealers in the Niagara Frontier and Rochester markets where price-fixing orders are in effect.

appears to have provided approximately the amount of money required for the state milk control activities in Virginia.

All funds collected (for both state and local use) by the milk control agencies in Virginia have to be deposited with the state treasurer, who credits them to the milk commission's account. Funds collected for use by the local boards are not carried as separate accounts by the state treasurer, but the commission keeps an individual account for each local board. Before 1940 each local board handled its own funds.

The Virginia law requires the milk commission to prepare an annual budget for the requirements of the commission and the local boards. The legislature then appropriates from the commission's account funds to cover the budget.

The milk control agencies in Maine, Vermont, and Rhode Island are also financed almost entirely from assessments. In Maine an annual license fee of $1 brings in about $800 a year. In Vermont the annual license fee is $2. The license fee in Rhode Island is $1, but it is paid only when the license is first taken out. In recent years, license fees in Rhode Island have brought in less than $25 a year.

The Maine Milk Commission is authorized to assess dealers 1.5 cents a hundredweight on all milk handled by them. One-half of the amount paid by dealers can be deducted from producers' milk checks. All sums collected by the commission have to be paid over to the state treasury but do not become a part of the general fund; they are appropriated by the milk control law for the purpose of administering the act.

In actuality the Maine milk control law provides for a total assessment of 3 cents a hundredweight.[21] One-half this amount, however, is deposited to the account of a dairy council, which was created in 1949 to promote the consumption of milk. Though financed by moneys collected by the milk commission, the dairy council is a separate organization. It is composed of the commissioner of agriculture, together with 2 producers and 2 dealers appointed by him.

In Vermont the law was changed only recently to provide for a flat license fee of $2 for all dealers selling 10 or more quarts of milk daily (except for consumption on the premises). In addition, each distributor is now required to pay 2 cents a hundredweight monthly on all milk received from producers and sold within the state during the preceding month. One-half of this assessment has to be deducted from the price paid to producers for milk. All funds collected in the form of license fees and assessments have to be paid into the state treasury but do not become state funds. The law appropriates the funds for the following purposes:

1. To collect the fees and assessments authorized.
2. To administer the milk control law and orders issued thereunder. The amount appropriated for this purpose is not to exceed 30 per cent of the receipts deposited in the state treasury.

[21] Before September 1953, a 2-cent rate was in effect.

3. The balance of the receipts is to be used "...for promotional and educational purposes, experimental planning, research, advertising, and necessary compensation and expenses of the (Vermont Dairy) Commission".

The Vermont Dairy Commission was created in 1953 to perform a function similar to that of the Maine dairy council mentioned above—that is, to promote the consumption of dairy products. This commission is composed of the commissioner of agriculture, the head of the Department of Animal Husbandry at the Vermont State College of Agriculture, the managing director of the Vermont Development Commission, 2 milk producers, and 2 milk distributors appointed by the commissioner of agriculture.

The authors know of no states other than Maine, Vermont, and California where funds collected by the milk control agency are being used for educational and sales promotion activities, although 9 or 10 states have laws that provide for some kind of deduction to support either dairy council work, American Dairy Association activities, or both.

The Rhode Island Milk Control Board is currently authorized to assess dealers up to 2.5 cents a hundredweight of milk sold as fluid milk and cream. Until 1953, the maximum assessment was 2 cents a hundredweight. Ordinarily, dealers are assessed the maximum rate, but there were periods during World War II when the maximum rate was not imposed because of curtailed expenditures caused by the manpower shortage. All funds collected are directly available to the agency.

In Connecticut the milk control program is financed by both license fees and assessments. The license fee is on a graduated scale, but it is approximately $5 per 100 quarts of daily average sales. This source of revenue brings in about $75,000 a year, and amounted to roughly 55 per cent of the total funds used for milk control work in Connecticut between 1941 and 1953. The other 45 per cent was derived from assessments. Assessments may not exceed 2 cents a hundredweight of milk purchased by dealers from producers. Dealers may deduct one-half of the assessment from payments to producers. Total assessments at the 2-cent rate yield about $100,000 a year when collected but, because of accrued balances, they have not always been collected in the past.[22] As in Rhode Island, all funds collected are directly available for use by the control agency.[23]

[22] There was no assessment between the periods: December 1943 and June 1944, July 1946 and June 1949, and January 1950 and July 1951.

[23] "Freedom from reliance upon the chief executive and the legislature for financial support is an important criterion of independence. We should not underestimate the importance of executive budgets and legislative appropriations as annual or biennial power-bestowing and power-withdrawing instruments—and by natural deduction, instruments giving the chief executive and even individual legislators an influence upon the commission that might not be otherwise. Commissions that finance themselves are generally free of this executive-legislative type of control.... Many state commissions on banking, insurance, public utilities, agricultural marketing and professional licensing support themselves in whole or in part through assessment of fees on the companies and individuals subject to their regulatory authority. As a means to independence, financial support is a excellent instrument; but it runs counter to the whole emphasis in democratic history upon legislative possession of the power of the purse." (Fesler, James W. Independent regulatory establishments. Elements of public administration, p. 211. Ed. by Morsteen Mark. 1946.)

The Pennsylvania Milk Control Commission is financed by license fees collected by the agency and by supplemental appropriations from the legislature. During the period January 1934 to May 1951, a total sum of approximately $4,298,000 was available for expenditure by the commission. Of this total, about 40 per cent was collected from the dairy industry in the form of license and penalty fees, while 60 per cent was appropriated from the general fund. This situation was considered undesirable by certain members of the Pennsylvania legislature, and the law was changed in 1953 to increase the license fee one-half cent per hundredweight of fluid milk and cream handled in the previous license year.[24] The change went into effect May 1, 1954, and has reduced materially the amount of money needed through legislative appropriations.

It has been estimated that under the current schedule of fees, about two-thirds of the money necessary to administer the milk control program in Pennsylvania will come directly from the industry and one-third will have to come from the general fund. All funds collected by the Pennsylvania Milk Control Commission have to be turned into the state treasury, where they are credited to the commission's account. As in Virginia, these funds are available to the commission only after being appropriated by the legislature.

All of the funds required to carry out the provisions of the milk control laws in New Hampshire, Massachusetts, New York, and New Jersey are appropriated annually by their legislatures. As noted earlier, however, funds collected by the agencies, which over the years have exceeded in each state except New Jersey the appropriations by the legislature, must be paid immediately into the state treasury to the credit of the general fund. Except in Massachusetts, such funds are collected in the form of license fees.[25] In New Jersey, appropriations for milk control from the general fund have been rather substantial, but not nearly so large as in Pennsylvania.

In Massachusetts, both license fees and assessments are collected and turned into the general fund. The license fee has been maintained at a nearly constant amount; the monthly assessments are adjusted so as to return enough funds to cover the balance of the annual appropriation by the legislature. During most of the year the maximum assessment of 2 cents a hundredweight is imposed on all Class I sales in markets where the milk control board establishes prices. In federal order markets, the board has assessed dealers 0.8 cent per hundredweight on Class I sales within the commonwealth.[26] If toward the end of the fiscal year it is evident that income is going to exceed expenditures, a hearing is called and the rates are lowered. In 1953, for example, the rates described above were cut in half during April and May.

[24] During the license year beginning May 1954, the additional fee was one cent a hundredweight.
[25] See discussion of license fees for each state on pages 55–58.
[26] The law provides that if dealers pay the assessment by the 10th of the month in which it is due, they may deduct one-half the amount from payments to producers.

There is one exception in Massachusetts to the above procedure. In New Bedford, where the state order provides for market-wide equalization, the milk control board makes an assessment of only 0.8 cent a hundredweight on Class I sales, as in the federal order markets. In addition, dealers are assessed locally by the market administrator of the New Bedford market to pay for the cost of administering the orders in that market.

The two upstate markets under state control in New York are also financed by local assessment by the market administrators. Unlike the license fee in New York, these assessments are not considered to be state funds. The law does not specify a maximum assessment, but the orders have limited the assessment to 2 cents until recent years, when the Rochester order was amended to allow a maximum assessment of 3 cents per hundredweight. This assessment is collected from dealers but may be deducted by the dealers when they make payments to producers.

Who should pay for milk control?

The question arises as to who should pay for milk control.[27] The general understanding has been that milk control is a program designed to benefit milk producers primarily and milk dealers and consumers secondarily. This suggests the fairness of a financing system that places the major burden on the producer. If, in part, milk control programs also provide important services to milk dealers, then dealers should help pay the cost. The regulatory aspects of milk control, which prevent market disorders, insure an adequate supply of high-quality milk, or add in any way to the general welfare of the public, may be regarded as in the public interest and properly chargeable in part at least to the state's general fund.

There appears to be no way to calculate with any precision what share of the cost of administering milk control programs should be borne by producers, dealers, and the public There is little doubt that producers have been the principal beneficiaries so far. It is also true, of course, that the improved economic position of producers has contributed to the general welfare. Dealers have benefited substantially from milk control in states where minimum resale prices are fixed. It must be recognized that the burden of the cost of milk control administration does not necessarily rest ultimately upon the group that pays the license fees or assessments. License fees paid by dealers, for example, become a part of their costs and tend to widen their margins. Likewise, assessments paid

[27]Dr. D. O. Hammerberg, Connecticut Milk Administrator, has assured the authors that "an effective well-conceived and responsive regulatory program, which is reasonably well adapted to the problems at hand, in effect, will pay for itself". To support this statement, he points out that additional payments by dealers to producers in Connecticut have, as a result of the regulatory program, been nearly three times as great as the cost imposed upon producers by the administrative assessments. At the same time, he points out that dealers have benefited greatly from the more complete and accurate accounts which they have been required to keep. Plant losses have been cut by two-thirds. This economy alone "may be more than sufficient to offset the foregoing extra cost which has been imposed upon them through the regulatory program" [i.e., extra payments to producers, plus the cash costs of license fees and administrative assessments which they have paid].

by producers may well be taken into account in determining the minimum prices they should receive for fluid milk.

A possible disadvantage of assessing dealers or producers for costs of milk control administration is that the group which pays such charges tends to insist that the program be administered primarily for its benefit.

An important problem for milk control agencies that are financed largely by assessments on the milk is the adjustment of their annual income to their needs. The laws specify the maximum rate of assessment, usually 2 cents per hundredweight, and the milk control agencies are authorized to fix a lower rate in accordance with their requirements. In some states, the practice has been to collect the maximum rate of assessment until large sums have been accumulated. Then the assessment is suspended until the surplus funds have been spent. Such irregularity is subject to criticism, first because it may encourage unnecessarily large expenditures, and, second, because it is likely to be inequitable for the dealers or producers who pay the assessments.

A better, more businesslike procedure would be to set up a budget of anticipated expenditures at the beginning of each year and determine the rate of assessment required to yield the necessary income. A suitable system of accounting and control should be used to keep the actual expenditures in line with the budget. Provision for reasonable reserves should, of course, be made. With such a system only minor changes in the rate of assessment will ordinarily be necessary during each fiscal year.

In general, it is desirable that the financing of milk control, as well as other state functions, be subject to legislative review and approval. Only the funds regularly appropriated for that purpose by the legislatures should be available for use by the milk control agencies.

Another problem in the financing of milk control programs is that of equity among dealers when the major source of income is dealer license fees. If these fees are paid annually, as they usually are, they may be inequitable for dealers whose volume of business is changing rapidly. The New York law solves this problem in part by providing that a dealer who sells a greater volume of milk than that upon which the license fee was based shall pay a supplemental fee of $20 for each additional 4000 pounds of milk, or fraction thereof, handled daily in any month of the license year. No provision is made, however, for adjusting the fees for dealers whose volume decreases during the license year.

Lack of agreement as to the best method of financing milk control programs is demonstrated by the variety of systems. The most equitable charges upon the industry are probably assessments collected from dealers monthly, and based upon the volume handled, including milk not purchased from producers.

Cost of milk control

Total expenditures by the milk control agency in each of the 10 northeastern states for the fiscal year ended in 1954 are shown in table 3. It will be noted that there was a tremendous range in expenditures among the states. In New York about $450,000 was expended by the division of milk control and by the market administrators' offices in Buffalo and Rochester, while less than $5000 was expended for milk control activities in Vermont. The cost of milk control in the other states fell between these two extremes. Total expenditures by the 10 northeastern states in 1954 amounted to more than one and one-half million dollars.

Among the principal factors that influence the total cost of milk control in the various states are the number and size of markets under regulation and the number of licensed dealers. This depends in part upon the size of the states and in part upon the extent of regulation undertaken. In some states, prices are fixed in practically all markets, while in others, such as New York, price-fixing orders are in effect only for the principal markets.

Table 3. **Expenditures for milk control functions, 10 northeastern states, Fiscal year ended in 1954**

State	Expenditures 1954
New York	$450,000 (estimated)
Pennsylvania	404,000
Massachusetts	178,189
New Jersey	170,071*
Connecticut	166,780
Virginia	113,146
Rhode Island	57,712
Maine	28,950
New Hampshire	15,132
Vermont	4,500 (estimated)
Total	$1,588,480

*Appropriation.

Whether or not resale prices are regulated also has an important bearing on milk control expenditures. Some milk control agencies have been given responsibility for a variety of functions not directly related to price regulation, and the performance of these duties adds to their costs. The division of milk control in New York State is responsible for administering all dairy legislation except the frozen desserts law and sanitary regulations for market milk. Roughly 30 per cent of the expenditure in New York is for work connected with the inspection of sanitary conditions in manufacturing plants and the checking of weights and tests. The division also checks for such adulterations as the watering of milk and to determine whether dairy products meet minimum legal standards. In most states, such functions are assigned to agencies other than the milk control authority.

The extent of certain enforcement programs, particularly the auditing program, also has an important influence on costs. As explained earlier in this report, some of the state milk control agencies do little auditing. On the other hand, it was estimated recently that nearly three-fourths of the total expenditures by the milk control agency in Connecticut could be attributed to the auditing program.

The nature of the administrative set-up in different states accounts for

some differences in costs. In Virginia, where the milk control program is relatively simple otherwise, each market has a local milk control board. The combined expenditures of the local boards in 1954 was almost $62,000, or about 60 per cent of the total expenditures for milk control activities in Virginia. In Pennsylvania, the control agency is headed by 3 full-time commissioners who are paid relatively high salaries. On the other hand, the boards in several of the states are headed by *ex officio* members who receive no compensation or by part-time boards whose members are paid on a *per diem* basis.

Licensing and Bonding

Licensing requirements

One of the principal means of regulating the milk trade is by licensing milk dealers and other distribution agencies. The milk control law of each state authorizes the licensing of milk dealers, and the laws of some states provide for the licensing of stores that sell milk.

In Maine and New Hampshire, only those dealers, including producer-dealers, operating in regulated markets must be licensed by the milk control agency. The situation is somewhat similar in Virginia, except that licensing is permissive with the milk commission. The milk commission has exercised its licensing authority from the beginning. During the first few years, it did not require producer-dealers to be licensed, but, as the result of a ruling by the state attorney general in 1937, producer-dealers as well as other dealers in regulated markets have since been required by the Virginia Milk Commission to obtain a license.

In general, all milk dealers in each of the 6 remaining states are required by law to be licensed by their control agencies. There are a few exceptions. Dealers selling 3000 pounds or less per month in New York and 1500 pounds or less per month in Pennsylvania may be exempted by the control authority from the license requirement. Also, in both of these states, dealers operating only in a market with a population of 1000 or less may be exempted. In Connecticut the milk administrator may exempt any dealer from the license requirement whose daily sales do not exceed 10 quarts of milk or its equivalent.

The New York law provides that, should the commissioner not choose to exempt small dealers and dealers operating exclusively in small markets, as noted above, he may fix by official order a license fee for them at some specified amount less than the minimum fee of $25 (see schedule below). The commissioner has, in the main, adopted this alternative. In Pennsylvania the commission has continually required all small dealers, as well as the larger ones, to obtain licenses.

The New York, Pennsylvania, and Rhode Island laws exempt from the license requirement certain farmers who retail a small amount of milk at

the farm. The New York law provides that farmers who sell quantities not exceeding 100 quarts a day at the farm on which it is produced shall be exempted from the license requirement; the Pennsylvania law exempts farmers who sell for cash at the farm not more than 2 gallons a day to any one consumer, or farmers who sell to consumers who provide their own containers. The Rhode Island law exempts from the license requirement producers selling, on the premises on which it is produced, less than 20 quarts a day to consumers.

In Virginia the control agency exempts from the license requirement farmers retailing milk who keep no more than two cows, provided that the milk is sold at the farm in containers brought by the consumer.

The provisions of the milk control laws relative to the licensing of stores vary considerably among the several states in the Northeast.[28] In Vermont only stores operating in markets under milk control are required to be licensed by the milk control agency. In Maine stores are licensed by the Dairy Division of the Maine Department of Agriculture. The Massachusetts law authorizes the control agency to exempt, and the Rhode Island law exempts, from the licensing requirement all stores that purchase their milk supply from a licensed dealer. In Pennsylvania the law provides that all stores may be exempted, and that all stores which buy their entire supply from a licensed dealer shall be exempted from licensing by the milk control commission. The fact that stores are not licensed in Pennsylvania and that there are no official orders exempting any class of stores seems to indicate that all stores obtain their milk supply from licensed milk dealers or handlers.

In New York all stores are exempted from the license requirement if they purchase their supply from a licensed dealer, do not operate a pasteurizing plant, and do not deliver milk to public eating establishments where the milk sold is consumed on the premises. Stores that do not meet these requirements, as well as stores that sell more than 3000 pounds a month for off-premise delivery, must be licensed. During the years 1933–37, when resale prices were fixed, all stores selling milk in New York were required to obtain licenses.

In Virginia the only stores licensed are those that operate as the exclusive outlet for a processing plant in a given market.

License fees

The fees charged for licenses vary considerably from state to state in the Northeast. In some states there is either no fee or a token one, while in other states the fee is substantial. In Pennsylvania the largest fee paid by any dealer is about $20,000 a year.[29] The differences in fees are

[28] In some of the laws, stores are so defined as to include restaurants and other establishments that sell milk for consumption on the premises only, but, in most instances, such establishments are not required to be licensed.

[29] The major part of this is paid in the form of an assessment based on the quantity of milk sold as fluid milk and cream.

caused in part by different methods of financing the administration of the milk control programs, as explained previously. In some states license fees are the chief sources of revenue, while in other states all monies needed to administer the law are derived through assessments.[30]

The methods of financing milk control programs were discussed earlier in this report (pages 26 to 31). As noted there, Virginia has no license fee; in Rhode Island the fee is $1 when the license is first taken out; and in Maine it is $1 annually. The license fee in Vermont for all dealers and stores selling 10 quarts or more a day is $2 annually. In Massachusetts the milk control agency is authorized to fix the annual license fee within a $5 limit. In recent years the schedule of license fees in that state has been as follows:

Daily sales	License fee
1 to 10 quarts	$ .50
11 to 30 quarts	2.00
31 quarts or more	5.00

The license fees in the other five states are fixed according to a graduated scale, and depend upon the average amount of milk handled or sold daily during the previous license year or during the high month of the previous year. New dealers are licensed on the basis of the amount they propose to handle or the average amount handled during the first few months of the license year. In some instances, the laws provide for adjustment of the license fee during the license year when there are significant changes in the volume handled. The dairy products generally included in calculating the volume on which the license fees are based are fluid milk and milk drinks, the milk equivalent of cream, and bulk condensed milk.

In New York, dealers handling not more than 4000 pounds of milk daily are required to pay a license fee of $25. For each additional 4000 pounds, per day, or any fraction thereof, the license fee is increased $20. In no instance, however, can a license fee exceed $5000.

The schedule of license fees for the other 4 states is shown on the opposite page for the year 1954.

In some of the states the laws provide for a special license fee for certain milk dealers, regardless of volume. In New York a $25 license fee is required annually of (1) a milk dealer who is a broker and handles no milk physically; (2) a milk dealer who is a producers' bargaining and collective cooperative and does not operate milk plants; and (3) a dealer who operates a plant for pasteurizing, handling, or processing milk for others on a fee basis only.

[30] In states in which the amount of the license fee is based upon the volume of milk handled, there appears to be little distinction between license fees and assessments. The main difference is that the license fee is usually collected in a lump sum at the beginning of the license year, while assessments are collected monthly according to the volume handled. In Pennsylvania, as noted below, part of the so-called license fee might more logically be called an assessment.

New Hampshire

Quarts sold daily	License fees
2– 20	$ 2.00
21– 50	4.00
51–100	7.50
101–200	10.00
Each additional 100 quarts	5.00

Connecticut

Quarts sold daily	License fees
0– 5	$ 2.00
11–100	5.00
Each additional 100 quarts	5.00

New Jersey

Monthly average sold previous license year	License fees
0– 2,500	$ 2.00
2,501– 5,000	7.50
5,001– 25,000	20.00
25,001– 100,000	70.00
100,001– 200,000	125.00
200,001– 500,000	200.00
500,001–1,000,000	300.00
1,000,001–2,000,000	500.00
2,000,001–5,000,000	700.00
5,000,001 or more	800.00

Pennsylvania

Pounds produced and bought, daily average	License fees*	
0– 20	$1	Plus ½ cent per hundredweight on all milk sold as fluid milk and cream in the state†
21– 100	3	
101– 500	10	
501– 1,000	15	
1,001– 2,000	30	
2,001– 3,000	40	
3,001– 4,000	50	
4,001– 5,000	60	
5,001– 7,500	75	
7,501– 10,000	100	
10,001– 15,000	150	
15,001– 25,000	200	
25,001– 50,000	300	
50,001– 100,000	500	
100,001– 250,000	1,000	
250,001– 500,000	1,500	
500,001– 750,000	2,500	
750,001–1,000,000	3,500	
1,000,001 or more	5,000	

*It is estimated that the largest dealer in Pennsylvania would pay a total fee of about $15,000.

†For the license year ended April 30, 1955, the rate was 1 cent per hundredweight.

In New Jersey a dealer who sells milk only to subdealers or other dealers must pay an annual fee of $250. Subdealers in New Jersey must pay an annual fee of $10 per route owned or operated at the beginning of the license year. In Pennsylvania, subdealers are required to pay a fee of $15 a year for each route owned or operated. All other dealers in Pennsylvania who purchase milk from a licensed dealer are charged a fee of $10. In New York, a dealer receiving only milk that is utilized or sold in the form of manufactured products other than bulk condensed milk must pay an annual fee of $10. In Connecticut, a $15 license fee must be paid by dealers using milk for manufacturing purposes only.

Special provisions also are made in some states for licensing dealers whose operations involve the handling of milk interstate. In Connecticut a dealer who sells milk exclusively in another state must pay an annual fee of $15 if his volume is less than 500 quarts daily and $25 if his volume exceeds 500 quarts daily. The New Jersey law provides for licensing such dealers at a flat rate of $25 a year.

The New York law authorizes dealers to deduct milk sold in other states in computing the license fee, while the Pennsylvania law authorizes dealers to deduct the amount of the license fees charged by other states on milk they ship from Pennsylvania when they compute the annual license fee to be paid the Pennsylvania Milk Control Commission.

In New Hampshire and New Jersey stores are required to pay an annual license fee of $1. In Vermont only stores situated in markets under price control are required to be licensed and the license fee is $2. In Connecticut the schedule of license fees is the same for stores as for dealers. In certain other states also, stores that do not meet exemption requirements are licensed as dealers.

License application

In all the states except Rhode Island and Virginia, all persons required to be licensed must make application and have their licenses renewed annually. In Rhode Island and Virginia, licenses continue in effect until surrendered or revoked. In Rhode Island this policy is according to statute, and in Virginia the policy was adopted by the milk commission in 1944. Before then the Virginia Milk Commission required all dealers to obtain a new license each year.

Restrictive licensing

In the states that have milk control laws, practically all firms engaged in the marketing of milk have to be licensed. In most of these states, the policy is to issue milk dealer licenses to all applicants who meet the rather easy requirements, and the licensing regulation is not restrictive in the sense that it limits the number of dealers in a market or the amount of competitive duplication in marketing facilities and services. Although it is customary to license the various applicants who wish to engage in a particular type of business in specified areas or markets, no effort is made to limit or discourage the entry of new firms. In general, the licensing regulation is looked upon primarily as a means of enforcing the orders issued by the milk control agencies. In New York State and Virginia, however, the licensing requirement is used to restrict the entry of new firms and to prevent the expansion of existing firms into new areas.

From 1934 to 1950, the New York law (Section 258-c) provided that:

> No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, *that the issuance of the license will not tend to a destructive competition in a market already adequately served*,[81] and that the issuance of the license is in the public interest. The commissioner may decline to grant or renew a license or may suspend or revoke a license already granted, upon due notice and opportunity of a hearing to the applicant or licensee, when he is satisfied... [that any of the licensing requirements are not being met].

The authorization given the commissioner to refuse a license on the ground that its issuance might bring about destructive competition in a market already adequately served has been interpreted by him as a man-

[81] Authors' italics.

date to grant few new licenses or extensions of old licenses. In one instance, an application for a milk dealer's license by a producer-distributor near a city of 15,000 population was denied on this ground, even though there were only 2 licensed dealers in the market. The term "destructive competition" appears to have been interpreted by the commissioner to characterize almost any competitive activity that would tend to reduce the volume and increase the unit costs of dealers already doing business in the market. Such dealers frequently appear as witnesses for the state in opposition to the granting of a new license.

This policy of restrictive licensing naturally has given rise to much controversy, and repeated efforts have been made by certain groups to have the authorization repealed or modified. In 1950, Section 258-c of the New York law was amended to provide that the commissioner may not deny a license to an applicant otherwise qualified unless he finds by a preponderance of evidence presented at a hearing "that the issuance of the license will tend to a destructive competition in a market already adequately served" or "that the issuance of the license is not in the public interest".

The Virginia Milk Commission and the Pennsylvania Milk Control Commission are given discretionary power to classify licenses and to issue licenses to dealers to carry on only certain kinds of business or to operate in specified areas. This authority has been exercised in Virginia but not in Pennsylvania. It has been the policy of the Virginia commission, when initiating regulations for a market, to license all dealer applicants who comply with the usual requirements. After regulation has been established in an area, however, it is more difficult to get a license. Officially, a license for a new distributor or the extension of a license for an existing business will be granted only on the condition that (a) the applicant is qualified by character and experience, financial responsibility and equipment; (b) the new facility will not tend to cause destructive competition; and (c) the additional facility is in the public interest. Since these requirements were announced, there have been relatively few applications for licenses to establish new milk businesses in Virginia.

To the knowledge of the authors, the specific authorization for restrictive licensing in the New York Milk Control Law is unique in dairy industry legislation, although restrictive licensing has been practiced to some extent and held legal in Virginia, and also in Oregon under a general grant of powers.[32]

The primary purpose of restrictive licensing of milk dealers and plants is to prevent destructive competition such as severe price-cutting and price wars. In New York State, where there is no direct control of resale prices, restrictive licensing is especially relied upon as a means of safeguarding the industry from such occurrences. As stated elsewhere, however, the

[32]Proc. 11th Ann. Meeting Internatl. Assoc. Milk Control Agencies, p. 85. 1947.

authors of this publication believe there is a more appropriate and effective way of dealing with this problem.

A second reason for the policy of restrictive licensing is to prevent excessive duplication of plants and delivery systems, and thereby to encourage more efficient distribution. This was stated officially in the 1934 report of the New York Milk Control Board to the legislature, as follows:

> The efficiency of distributing milk is lessened and the cost is increased by the multiplicity of milk dealers already distributing milk. It should be possible to prevent the entrance of new dealers in the business unless there is a clear-cut need for such dealers and unless it can be shown that their entrance into the business will tend to increase efficiency in the distribution of milk. The price paid by consumers is increased and the price paid to producers is decreased because of inefficient distribution, and as has already been pointed out, an excessive number of milk dealers makes for inefficient distribution.

No doubt this official view of the milk control board was an important factor in persuading the New York legislature to provide for restrictive licensing in the amended law. The policy has been actively supported by milk dealers and by certain milk producers' associations that operate country plants or are engaged in distributing milk. These organizations naturally want to be protected from new competition.[33]

Whether milk distribution can be made more efficient by limiting the number of dealers and plants and by restricting the areas in which they are allowed to operate is doubtful. Some economists who have studied the matter carefully believe that complete rationalization of milk distribution would result in substantial savings, but others disagree.[34] In any event, restrictive licensing appears to be a weak and ineffective method of promoting efficiency in the milk industry. It tends to protect firms and plants already in the field regardless of their efficiency. It definitely lessens the competitive pressure upon milk dealers to improve service and quality and to reduce their margins and costs. It encourages dealers in the less competitive markets to maintain retail and wholesale prices at higher levels than necessary to cover the costs of efficient operators. There is a natural tendency on the part of milk dealers to resist the adoption of new methods of distribution and pricing. Under restrictive licensing, this negative attitude is encouraged and is likely to be a serious obstacle to market improvements.

The restriction of the areas within which a milk dealer may operate is particularly undesirable at such a time as the present, when economic changes call for an expansion of distribution areas.[35] In the years since

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[33]It should be explained in this connection that under the New York law, each firm operating country milk-receiving plants must be licensed as a milk dealer. The license specifies the location of each plant. To open a plant at any new location, the licensee must apply for an extension of his license to cover the proposed new plant.

[34](a) Bressler, R. G., Jr. City milk distribution. Harvard Univ. Press. 1952. (*See also* review of this book by Leland Spencer: J. Polit. Econ., p. 361–362, Aug. 1954.)
(b) Spencer, Leland, and Johnson, Stewart. Milk distribution and pricing in Great Britain. Cornell Univ. Agr. Exp. Sta. Bul. 902:106–130. 1953.

[35]Spencer, Leland. Size of milk pasteurizing plants in twelve counties of central and southern New York. N. Y. State Coll. Agr., Cornell Univ. Farm Econ., p. 4841–4846. March 1952.

World War II, there has been a marked trend toward the distribution of milk pasteurized and packaged at given points to be distributed over more extensive areas. The increasing use of paper containers is a major factor in this trend, but the higher capital requirements of milk-pasteurizing plants also have played a part. The optimum size of plant is greater now than formerly and small-volume plants are at a greater disadvantage. Up to 10 or 15 years ago, nearly all milk-pasteurizing plants served only the communities in which they were situated. Now some plants supply markets as much as 50 to 100 miles away, and a few in sparsely populated regions ship milk in paper containers to consuming centers 500 miles or more distant. Under favorable conditions, such widespread distribution results in lower costs. It helps to make milk in paper containers available to consumers in many small markets where otherwise it would be available only at relatively high prices or not at all.[36]

The New York Division of Milk Control has recognized, to some extent, the economic advantages of wider areas of distribution by creating a number of official marketing areas that embrace entire metropolitan districts and by licensing dealers to operate throughout these areas. Nevertheless, the policy of requiring dealers to limit their operations to specified areas tends to prevent or delay the expansion of distribution areas as rapidly as it would be in the public interest for them to expand.

It is especially difficult to justify restrictive licensing that is designed to check or reduce competitive duplication of milk distribution facilities and services where there is no control of resale prices or margins. Without such control, there is no assurance that possible savings in distribution costs will be passed on to consumers or producers. It seems likely that in the long run restrictive licensing will lead to more bureaucratic regulation of dealers' margins, retail prices and distribution services than would exist if competition were encouraged. The question arises also whether it is logical for a state to restrict the number of dealers or plants and at the same time fail to regulate such trade practices as the frequency of delivery, bottle deposits, credit extension, and the like that have a direct effect upon distribution costs.

Under the policy of restrictive licensing as it is carried out in New York State, it becomes necessary for anyone wishing to enter the milk business to buy out a firm that already has a license. This confers vested rights upon those firms that happened to be in the field when restrictive licensing became effective, and it has enhanced the good-will value of milk distribution enterprises in the State. The result is that the privilege of distributing milk has been capitalized, requiring somewhat larger profits if the milk dealer's investment is to yield a fair return.

[36] Cook, Hugh L. Paper packaged milk in Wisconsin: Its part in expanding distribution areas. Univ. Wis. Res. Bul. 179. June 1953.
Koller, Fred E., and Cable, C. Curtice, Jr. Small-town milk business in period of change. Univ. Minn. Minn. Farm Bus. Notes No. 345. March 1953.

An attempt was made to ascertain the effect of restrictive licensing upon the trend in numbers of dealer licenses issued in New York as compared with other states. Because of differences in the definition and classification of dealers in the several states, it is extremely difficult to make useful comparisons of trends in numbers of licenses issued. Also, certain factors —such as when pasteurization became compulsory—have had an important influence on these trends. In addition, some states have changed their licensing laws to require additional types of "dealers" to be licensed. A change in the New York law in 1942, for example, required for the first time that milk brokers, manufacturers, and bargaining cooperatives obtain licenses.

In general, there has been a sharp downward trend in the number of licenses issued in each of the states. The rate of decrease in New York appears not to have been significantly different from that of several of the other states where restrictive licensing has not been a factor. If anything, there is some indication that restrictive licensing, as practiced in New York, has tended to keep more rather than fewer dealers and plants in the milk business. Restrictive licensing protects existing firms and plants from new competition and thereby permits the continued operation of firms which would otherwise be forced to consolidate or go out of business.

Bonding requirements

In several of the northeastern states milk dealers are required to deposit surety bonds or other security to insure full payment to producers for their milk. New York and some other states had such a requirement long before the milk control laws were enacted.

The need for bonding arises mainly from the fact that dealers usually pay for the milk received from producers once or twice a month and, at any given time, owe for the milk delivered during the preceding 10 to 55 days. It has often happened that unsuccessful or dishonest dealers got behind in their payments until they owed for the milk received during the preceding 2 or 3 months. When dealers failed to pay because of bankruptcy or other reasons, the producers suffered serious losses.

In markets where equalization is practiced, the bonding of dealers helps to protect all the producers by insuring payments into the equalization fund as well as the payments that are made directly to producers. In some of the states, administration of the bonding requirement is a function of the milk control agency, while in others it is carried out by other agencies, usually the department of agriculture.

The milk control laws in only 3 of the states in the Northeast provide for the bonding of milk dealers: Connecticut, New York, and Pennsylvania. In Vermont, New Hampshire, Massachusetts, and New Jersey, milk dealers may be required to be bonded under laws administered by their departments of agriculture.

Where there is a close working relationship between the state department of agriculture and the milk control agency, as in Vermont and other states, the division of authority is not a serious matter. The bonding law in Massachustts is administered by the department of agriculture, but the milk control law provides that the commissioner of agriculture shall make available to the milk control commission all records and information relative to the bonding of milk dealers. Information obtained by audits made by the division of milk control, which is essential to the commissioner of agriculture in the determination of proper bond, is made available to him. From 1939 to 1950, the Massachusetts Milk Control Law required the milk control board to pay the salaries of two bonding investigators and their clerk, and also to pay their expenses while in the field. This law further provided that the 3 persons in question could be assigned by the commissioner of agriculture to the division of milk control. The commissioner of agriculture never exercised this prerogative.

Maine and Virginia have no legislation that requires the bonding of milk dealers. Rhode Island has a bonding law which has never been enforced. More than 60 per cent of the milk supply for Rhode Island comes from other states and is beyond the jurisdiction of the state authorities.

In Virginia, the milk commission has inferred that it has authority to require dealers to be bonded under its general grant of powers to make, adopt, and enforce all rules necessary for carrying out the purposes of the law. In 1935 the commission included in the order for one market a requirement that distributors be bonded, but this requirement was opposed so vigorously by the distributors that it was rescinded in a matter of weeks. Since then bonding has not been considered a practical policy in Virginia.

In Connecticut, the bonding of milk dealers is permissive with the control agency. The law authorizes the milk administrator to require a dealer to provide a bond payable to the state for the benefit of producers whenever the administrator finds such action necessary for the protection of producers. In New York, bonding is mandatory. The milk control law requires that each dealer buying milk or receiving milk on consignment from producers, cooperative associations, or other dealers for the purpose of resale or manufacture shall execute and file a bond. Similarly, in Pennsylvania, the milk control law requires that all milk dealers who purchase, receive on consignment, or otherwise acquire milk from producers must file bonds.

In New York, the commissioner may exempt certain dealers from the bond requirement if he is satisfied after an investigation that they are solvent and have sufficient assets that payment to creditors for milk purchased is reasonably assured. The commissioner may require, as a condition for exempting these dealers from the bond requirement, that cash be deposited in a bank or trust company under terms that will, in his

opinion, give producers the protection they need. The New York commissioner has found it possible to exempt many dealers from the bonding requirement, but in most instances the exemptions are for small dealers purchasing limited quantities of milk from a few producers and making prompt and frequent payments. In all instances of exemption, the producers concerned or the officers of a cooperative representing producers must sign waivers indicating their willingness to sell milk to the dealers without the protection of a bond.

In New Jersey, the department of agriculture requires both resident and nonresident dealers purchasing milk from New Jersey producers to post bonds. In Massachusetts, only dealers who operate plants within the state and who are buying from Massachusetts producers are required to post bonds. In Vermont, all dealers who purchase over 250 quarts of milk daily are required to file surety bonds for the protection of their producers. Cooperatives whose producers are stockholders are exempt from surety bonds. The bond is for the exclusive protection of producers in Vermont and does not cover purchases from other dealers.

In New Hampshire the steps taken to protect producers from credit losses include bonding and required special reports. Out-of-state dealers and some local ones purchasing milk from New Hampshire producers must file surety bonds. In other instances, dealers are permitted to file title to real estate. Certain dealers who cannot qualify by filing any kind of security are required to submit special reports showing the status of their payments to producers for milk purchased. This allows small struggling dealers to remain in business, but serious difficulties can usually be anticipated and action taken to prevent large losses.

Amount of bond

In general, the amounts of bonds required of dealers are determined by the control agency. The amounts are usually based upon the value of milk and cream purchased during a payment period. In New York the bond may in no instance be less than $2000 or more than double the maximum value of milk purchased by a dealer in any one month in the previous year and, in any event, not more than $100,000.

The Connecticut law stipulates that the amount of the bond shall be reasonable but that it shall in no event exceed double the value of milk received during the peak month of the previous year. In Pennsylvania the commission is somewhat more restricted in its power to determine the amount of bond required. In all instances, the bond must be equal to the value of the largest amount of milk purchased in any one month during the preceding year, but may not exceed $100,000. If the milk dealer or handler pays producers in full each week, the bond must be equal to 50 per cent of the value of the milk received during the peak month of the previous year, but it may never be more than $50,000. Under special circumstances, these maximum amounts may be increased

50 per cent, that is, to $150,000 and $75,000. Subdealers are required to furnish a bond of $300 for each route operated.

In New Jersey, the amount of the bond cannot be less than 150 per cent of a milk dealer's estimated maximum monthly purchases from producers, with a maximum bond of $100,000. In connection with bonding, New Jersey dealers are required to pay an annual license fee of $10 (other than the regular license fee) if their purchases from producers exceed $200 annually.

In Vermont, the amount of the bond is at the discretion of the commissioner of agriculture but may not be less than $100 or more than $300,000.

Action on bonds

Bonds or other forms of security filed with the control agencies insure prompt payment of amounts due to producers for milk sold or consigned by them during the license year.[37] Whenever it is learned that a dealer has defaulted in his payments for milk, the control agency may bring action upon the bond. The laws usually provide that if recovery upon the bond is not enough to pay all claims as finally determined, the available funds shall be divided *pro rata* among the claimants.

During the years milk control has been in effect, claims have been small compared with the value of milk and cream sold to dealers. In New York, for example, the largest amount of the claims in any year was $65,533 in 1947, an insignificant amount in relation to the total value of milk and cream (about $366 million) received at New York dairy plants. The fact that prices have been on the upswing during most of this period and that business in general has been prosperous may account for the relatively small losses. With a falling price level and more unemployment, the need to protect producers by bonding dealers might be much greater.

The degree to which producers need protection by the bonding of dealers cannot be measured entirely by the amount collected on claims. Some dealers who might not have paid otherwise have done so because they were required to put up collateral that would have been forfeited if producers had not been paid. Secondly, the bonding requirements of the milk control laws or other laws tend to increase the security of producers by helping to keep out of the milk business persons who are financially irresponsible or untrustworthy.

While bonding is recognized as an important milk control function, some states have found it difficult, if not impossible, to apply universally. Some milk producers insist on selling to dealers whose financial status is known to be insecure. Producers also sometimes fail to fulfill their obligation to report immediately when a dealer falls behind in his payments.

[37] In some states the bonding laws protect dealers selling milk to other dealers, but this is intended as an indirect protection of producers.

Checking Weights and Tests

The laws of nearly all of the northeastern states provide for checking the weights and tests of milk received from farmers at dairy plants. In most states, this service, designed to protect producers from fraudulent practices on the part of milk buyers, was in effect long before the milk control laws were enacted. When the states began to require milk dealers to pay fixed minimum prices for milk, however, the checking of weights and tests became much more important. Without effective supervision of the weighing and testing of milk, it would be relatively easy for a milk dealer to evade the minimum prices by reporting weights and tests lower than the correct amounts.

The purchase of milk by its weight and quality, including butterfat test and bacteria count, became a common practice during the years 1912 to 1930. Almost simultaneously, the various states enacted legislation to specify the way in which the various tests were to be made and to provide for the licensing of persons making the tests. In turn, programs were established for checking the accuracy of the work done by the testers and weighers who were employed by the dealers purchasing milk from farmers.[38] Without exception, these programs were under the direction of the state departments of agriculture.

Since the checking of weights and tests of milk was an established function before milk control and the original milk control programs were thought to be temporary, this function was left in the department of agriculture in all of the states during the initial years of milk control. In most of the states this is still so. Only in New York, Pennsylvania, and Massachusetts is the checking of weights and tests a responsibility of the milk control agency.

The checking of weights and tests was assigned to the New York Division of Milk Control, along with other duties relating to the administration of dairy laws, when the division was created in 1934. In Pennsylvania the checking of weights and tests was assigned to the milk control commisison in 1937, when the Pennsylvania Milk Control Law was made permanent. In Massachusetts the law was not changed until 1946, when the checking of butterfat tests was put under the supervision of the director of milk control.

Although the checking of weights and tests has not been assigned to the milk control agency in Connecticut, the general laws relating to milk and milk products were changed in 1945, 1947, and 1949 to provide for closer cooperation between the milk administrator and the Connecticut Department of Farms and Markets, which does the check-testing. For small dealers in Connecticut who prefer not to do their own butterfat testing, the law provides: (1) that the commissioner of farms and markets shall at least twice during each calendar month take samples from and

[38]No such program was in operation in Virginia before the enactment of the milk control law.

test the butterfat content of the milk delivered by each producer to a dealer's plant; (2) that the commissioner shall notify the milk administrator in writing of the result of the tests; (3) that the milk administrator shall compute the average of the tests of each producer's milk and notify each producer and the dealer concerned of the results; and (4) that the average test computed by the administrator shall be used as a basis of payment for milk received during that month. The commissioner handles butterfat tests for about 15 per cent of the milk in Connecticut.

In Virginia there is no specific requirement in the milk control law for check-testing, but the general powers granted to the milk commission are sufficiently broad to authorize this service. In practice, the orders issued by the Virginia Milk Commission require all dealers to make a minimum of three butterfat tests a month of each producer's milk. These tests are subject to verification by a licensed tester designated by the commission. While the commission may require local boards to adopt check-testing as a part of the local program, it has usually been left to the discretion of the local board. As might be expected, the amount of check-testing done varies considerably among the different markets. In the larger markets, monthly check-tests are usually made of each producer's milk; in some of the smaller markets, however, there is no check-testing by the local boards.

In Pennsylvania, it is the policy of the commission to check-test the producer butterfat samples at each plant at least once a year. The tests at some plants are checked more often. Two dairy agents are assigned to each of the 6 districts into which the state has been divided. These agents make routine check-tests and, in addition, check-test all samples where a complaint is involved. The milk control commission's inspectors also carry certified weights to check the scales on which the incoming milk is weighed at the plants.

In New York, it is the aim of the division of milk control to check-test the producer butterfat samples at each plant two or three times a year, but the field force is small and it is impossible to visit all plants as frequently as desired. Consequently, many plants are checked only once a year. Repeated tests are made when there is reason to believe the plant tests are inaccurate.

The New York Division of Milk Control has reported that check-testing is one of its major projects. Inspectors test remaining portions of composite samples and compare their results with the tests recorded earlier by the licensed tester employed by the dealer. As a rule, it has been found that testing is fairly accurate, but sometimes, either by design or otherwise, producers have been credited with less than the proper amount of fat. Although not required to do so by law, the New York Division of Milk Control has checked the correctness of milk weights credited to producers, as well as the accuracy of butterfat tests, since 1936. When making a weight check, the inspector usually weighs a producer's milk at

the farm, without the dealer's knowledge, weighs the cans after they are returned, and then compares the net weight of milk with the weights recorded by the dealer.

The accuracy of milk plant scales in New York is checked by the State Bureau of Weights and Measures in the Department of Agriculture and Markets and by local and county officials. This bureau also helps assure the accuracy of weighing and measuring by requiring that all weighing and measuring devices be approved by the bureau before being sold. The sale of inaccurate devices or those that lend themselves to manipulation is forbidden.

In New Jersey the check-testing program is under the direction of the State Department of Agriculture, but the milk control agency has maintained a laboratory under the direction of a licensed milk tester and a small amount of check-testing has been done by the agency.

Enforcement

Laws that are widely violated usually do more harm than good. This is especially true of legislation such as the milk control laws, which have an important effect on competitive trading. When the responsible authorities are unable to obtain a high degree of compliance with such laws, those who do comply are severely penalized, possibly to the extent of being forced out of business. On the other hand, poorly enforced legislation of this kind encourages dishonesty, deceit, and wasteful practices.

Problems of enforcement

The milk control agencies have experienced much difficulty in obtaining satisfactory enforcement of their regulations. Several basic problems account for this unusual difficulty of enforcement.

1. The price-fixing regulations have often been contrary to the immediate interests of both buyer and seller, and thus have been self-enforcing to only a limited degree. In many instances, for example, producers and other sellers of milk have felt it was more important to hold their markets than to get the minimum prices specified by milk control orders.
2. Some milk control regulations, notably those fixing minimum retail and wholesale prices, have been generally regarded by consumers and others as unnecessary and not in the public interest. Consequently, they have had little public support. Price-cutters have often been regarded as public benefactors rather than as culpable violators.
3. The constitutional authority for the various provisions of the milk control laws and orders has been in dispute. This was an especially serious obstacle to successful enforcement during the early years of milk control. Court decisions have clarified many aspects of the authority of state and federal milk control agencies, but after 20 years some issues still remain in doubt.
4. Court decisions on the respective jurisdictions of state and federal milk control agencies have had the effect of limiting the authority of the state agencies to milk that is produced and sold in the same state and that does not become involved directly or indirectly in interstate commerce. The inability of the state milk control agencies to enforce prices to be paid by dealers for out-of-state milk has, in turn, limited

their ability to obtain compliance with the minimum prices fixed for milk produced and sold within the state.

Methods of enforcement

Milk control officials have differed widely in their attitudes toward enforcement. Some have taken the position that anyone who has violated a regulation, no matter what the circumstances, has committed an offense against the state and should be prosecuted. At the opposite extreme are officials who have emphasized the educational approach to the problem of getting satisfactory compliance and have regarded court action against violators as a last resort. In general, it has been the view of these more lenient administrators that it was impractical to force all milk dealers to change suddenly their accustomed ways of doing business, and to comply immediately with all provisions of the new milk control orders. The more capable administrators in this group have vigorously enforced the law against flagrant and persistent violators. At the same time, they have been more lenient in dealing with minor violations, with the object of bringing about satisfactory compliance within a reasonable length of time.

Obviously, the exercise of discretion with respect to action against those who violate milk control orders or regulations should be confined within narrow limits. Otherwise, charges of favoritism will arise, and the responsible officials will lose the respect of those who are subject to their regulations.

Consultation with industry groups. The informal procedures for obtaining compliance with milk control regulations begin with the drafting of orders. Consultation with industry groups at this stage, or at least before the orders are made effective, helps to eliminate unreasonable provisions, as well as errors and ambiguities. It also helps to acquaint members of the industry with the purpose of and the need for the contemplated regulations. Such consultation is likely to make the regulations more easily enforceable and to arouse more general industry support for them.

The Virginia Milk Commission has emphasized negotiation and compromise with industry groups perhaps more than any of the other state milk control agencies. In fact, it appears to be as much a mediation agency as a regulatory body. Conner describes the Virginia procedure as follows:

> ...immediately upon the close of the hearing begins the process of bargaining, negotiation and compromise between industry goups with the commission serving as a spokesman or go-between and acting informally as arbitrator. Through this informal process the commission has been able to clear essential points with the industry groups...so as to obtain greater cooperation...and a greater degree of compliance... On a few occasions, presumably where this has not been done...opposition to the regulations has developed... [and] the commission [has] considered it expedient to revoke them within five to ten days after their issuance.[20]

[20]Conner, M. C. The milk market control law in Virginia, p. 19. Virginia Agr. Exp. Sta. Bul. 444. June 1951.

In some other states, as well as in the administration of federal orders, such negotiations with industry groups following a hearing would be regarded as improper, and under federal regulations they are illegal.

The Pennsylvania Milk Control Law calls for a pre-order conference following a public hearing, before an order or order amendment may be made effective. The commission issues a proposed order; dealers and other interested parties are given an opportunity to criticize it and suggest changes before the order is made final.[40]

In New York State, even though it is not required by law, the Commissioner of Agriculture and Markets provides an opportunity for oral arguments on proposed orders or amendments following a hearing on particularly difficult or controversial issues.

A somewhat similar procedure is followed in connection with federal milk orders. The federal authorities issue a proposed decision on the issues that were considered at a hearing and they issue also a proposed order or amendment. Interested parties are given an opportunity to file briefs on these proposals before a final decision is announced and a final order submitted to a producer referendum. These procedures involve some delay in getting orders and amendments into effect, but they help to eliminate unwise or unworkable provisions, to ensure proper wording, to avoid loopholes, and to create a more favorable attitude toward compliance.

Under the New York Milk Control Law, a petition by a producers' bargaining agency representing at least 35 per cent of the producers affected is a necessary first step toward the promulgation of a price-fixing order for any market. Similarly, in Maine, New Hampshire, Vermont, Virginia, and perhaps other states, it is the policy of the milk control agencies to determine whether regulation of a market is desired by the industry before imposing controls. The New York law requires approval by a two-thirds vote of the producers affected before a price-fixing order may be issued. Such requirements have the effect of limiting the regulatory activity to areas in which it will have strong support at least from the producer side of the industry. Successful enforcement is more likely under those conditions than when control is introduced without industry approval.

In Connecticut, the Wholesale Milk Producers' Council, an agency especially authorized by the milk control law of that state, has helped to arrange for free discussion of milk control problems and to mobilize farmer support of the regulations.

Education and publicity. Law enforcement agencies must proceed on the principle that ignorance of the law is no excuse for violation. There can be no doubt, however, that a better understanding of the milk control laws, as well as of the regulations and orders issued by the milk control

[40]Only those testifying on the record in the original hearing will be heard at the pre-order conferences; no new evidence is permitted.

agencies, will help to keep the number of violations at a minimum. It is important that those concerned should know not only what the regulations are but also the reasons for the regulations and the penalties for failure to comply. Sometimes they must be taught *how* to comply. Efforts to educate dealers and plant operators in regard to the keeping of essential records and the preparation of required monthly reports have brought about much better compliance with the regulations.

One milk control official has stressed the importance of education in this way: The milk control law

> ...is the type of law that requires less actual police work than almost any of the other laws. It requires for successful enforcement not the blackjack...but, instead, education. The people of...[the] community must be sold on the idea or you will not get to first base in your enforcement.... You must create a desire on the part of every member of the dairy industry to comply with the Act....[41]

Publicity is a powerful weapon that is sometimes used effectively to deter milk dealers and others from violating milk control regulations. Prominent firms especially shrink from the prospect of publicity that will identify them as violators, chiselers, and the like.

The majority of the state milk control laws have strict provisions against the disclosure of confidential information concerning a dealer's business. This limits, but does not prevent, the use of publicity as a means of discouraging violations. The New York and Connecticut laws give the control agencies the authority to reveal to producers directly interested any of the findings of an examination or audit that, in its judgment, will serve the public interest and accomplish the purposes of the law. The New York law goes further by authorizing the commissioner of agriculture and markets to publish all or any part of the findings resulting from an examination or audit of dealers' books and accounts. It has been the policy of the agency, however, to reveal such information only when there are special reasons for doing so.

Persuasion and warnings. Closely associated with education and publicity as an informal procedure for obtaining compliance with milk control regulations are efforts of the administrative agencies to persuade those who show a tendency to violate the provisions of milk control orders to mend their ways. Persuasion is usually most effective when it is possible to convince the violators that it will be to their advantage to comply fully with the regulations, and that penalties will be inflicted or court actions instituted in the event of further violations. If such warnings are to be effective, they must be backed up by prompt and forceful action to demonstrate that violation of milk control orders does not pay.

Persuasion as a method of enforcing milk control orders is given unusually clear recognition in the milk control law of Alabama, which states that the control board is authorized to:

> ...grant or renew a license or...permit a licensee to retain his license conditioned

[41] John Chandler, Esq. Proc. 6th Ann. Meeting Natl. Assoc. Milk Control Agencies, p. 62. 1940.

upon the agreement of the applicant or licensee to do the things required by this Act . . , or of any lawful order, rule or regulation of the Board, or conditioned upon his agreement to omit, cease or desist from doing anything which he has been doing in violation of this Act or any lawful order, rule or regulation of the Milk Control Board. . . .

The milk control agencies are specifically authorized to use a variety of more formal enforcement measures, such as requiring dealers to keep records and file reports, imposing fines, and revoking licenses.

Keeping of records. The keeping of good records by licensed dealers is a fundamental part of the entire enforcement program. Without suitable records, it would be extremely difficult to detect dishonesty and fraud such as underpayment of producers by the improper classification of milk. The auditing program, which is discussed later, cannot be effective unless good product and financial records are available. A useful statistical information service also hinges on good records.

Because of the importance of records, each of the milk control laws, except that of Virginia, specifically authorizes the milk control agency to require milk dealers to keep such records as may be deemed necessary for proper enforcement of the law. Presumably the Virginia Milk Commission is also granted this authority under a blanket provision that authorizes the adoption and enforcement of all rules, regulations, and orders necessary to carry out the purposes of the act.

The Maine, Massachusetts, Connecticut, New York, New Jersey, and Pennsylvania laws spell out in greater or less detail the kinds of records which the agency may require dealers to keep, but each of these laws also authorizes the agency to require such other records as are deemed necessary.

The New York law, for example, provides (Section 258-f) that:

The commisisoner may require milk dealers to keep the following records:

(a) A record of all milk received, detailed as to location, and as to names and addresses of suppliers, with butter fat test, prices paid, deductions or charges made.

(b) A record of all milk sold classified as to grade, location and market outlet, and size and style of container, with prices and amounts received therefor.

(c) A record of quantities and prices of milk sold.

(d) A record of the quantity of each milk product manufactured and quantity of milk and/or cream used in the manufacture of each product. Also the quantity and value of milk products sold.

(e) A record of wastage or loss of milk or butter fat.

(f) A record of the items of the spread or handling expense and profit or loss, represented by the difference between the price paid and the price received for all milk.

(g) A record of all other transactions affecting the assets, liabilities, or net worth of the licensee.

(h) Such other records, and information as the commissioner may deem necessary for the proper enforcement of this article.

The New York commissioner of agriculture and markets has issued orders (*e.g.*, Order No. 130, June 30, 1941) specifying in more detail what records must be kept by milk dealers, including daily records of the receipts and utilization of milk, and a complete record of the way the price paid to

producers is computed. Each milk dealer is required to "make available at all reasonable times, to any employee designated by the commissioner, all books, records, or documents relating to the purchase or sale or receiving or handling of milk and milk products".

So far as known to the authors of this report, none of the milk control agencies has required the use of specified accounting forms or record systems.

Filing of reports. Each of the milk control laws provides that the milk control agency may require dealers operating in the state to file such reports as it deems necessary or that each dealer shall file with the agency such reports as the agency may reasonably require. All of the agencies require dealers to file reports. There is considerable variation, however, in the amount of detail called for in these reports. Some agencies accept a rather simple report of receipts and sales, while others require detailed figures on practically all aspects of the dealers' operations.

The reports are checked for obvious discrepancies and, when the data are used as the basis of payments to producers, they are usually audited.

In 1954, the New Jersey Office of Milk Industry issued an order which required processors, dealers, producer-dealers and subdealers to file detailed monthly reports of sales and purchases of milk at prices less than the minimum prices fixed by that agency. In other words, the licensees were required to report violations of the resale price orders by themselves and by others with whom they did business. It was required that these reports be verified by oath or affirmation. A violator giving inaccurate information in his report was subject to prosecution for perjury.

This was a new type of procedure for the enforcement of minimum resale prices. The regulation was upheld by the Superior Court of New Jersey and substantial penalties were paid by several violators. Even before the court decision was issued, however, the office of milk industry discontinued the fixing of resale prices. Consequently, this unique method of enforcement has not been fully tested.

Investigations and audits. All of the milk control laws provide that properly designated milk control personnel shall have the right to enter any place where milk or milk products are handled, or where records relating to such handling are kept, and make such examinations as are deemed necessary. The following provision of the Connecticut law is fairly typical of the provision concerning entry and inspection that is found in each of the laws:

> ...The Administrator or his designated agent shall have access to and may enter and inspect at all reasonable hours all places, equipment and vehicles where milk and milk products are being received, purchased, stored, bottled, manufactured, sold or handled and where books, papers, records or accounts are kept.... The Administrator or his agent shall have power to examine, copy and audit, from time to time as he shall deem necessary and proper, the books, papers, records and accounts of dealers and others for

the purpose of effectuating the policy and provisions of...[the law] or any order, ruling, regulation or direction promulgated thereunder.[48]

Wherever the classified pricing plan is used, dealers' reports of their purchases and use of milk should be carefully audited to ensure that the proper quantities have been reported in each class. This is an especially important task in milksheds that have large surpluses and where there is a wide difference between the prices of fluid and surplus milk. Dealers' monthly reports should be audited promptly as well as thoroughly. Delays in auditing detract from its effectiveness.

Effective auditing of milk utilization is one of the significant advantages that can be gained for producers by the public control of milk prices. Before the state and federal milk control programs were adopted, some of the stronger milk producers' associations had been able to establish fairly effective auditing, but other cooperatives had not. Underpayments by dealers who failed to report in full the milk used in the higher-priced classes was a serious problem.

The Federal Trade Commission, in a report of its investigations of the dairy industry in 1936, commented as follows on the importance of regular and effective auditing:

In order that producers' cooperatives and regulatory agencies can be assured as far as possible by sound accounting methods, that distributors have paid producers according to the prevailing agreements or regulations, the commission considers it fundamental that the distributors' books be audited periodically. A thorough audit, assuming of course that adequate records are kept, would disclose the quantities of milk sold in each established sales class. To make sure that such quantity data have been determined in accordance with the prevailing agreements or regulations, it is necessary to reconcile the quantities sold with respect to dollar sales that appear in the profit and loss statement for the period audited. Without the reconciliation of quantity and dollar sales, auditors cannot be certain that quantity sales by each class have been properly accounted for.[49]

In general, the milk control agencies, such as those of New York and Pennsylvania, whose markets require the most careful auditing, have taken their responsibility seriously and have done a thorough job. In Vermont auditing is less essential, since a flat price is fixed for all milk purchased by local dealers. The Vermont board does no auditing. The milk control agencies of New Hampshire and Virginia each employ one auditor, although there are 30 markets under regulation in Virginia and 90 in New Hampshire. In these states milk is priced on the basis of use, but there is relatively little surplus and, since each dealer pays a blended price, competition for supplies tends to prevent serious underpayments based on false classification of the milk.

A somewhat similar situation exists in Maine, where, until recently, the auditing program of the milk control board was on a very modest scale. Before 1943, the milk control agency employed only one fieldman

[48]Connecticut Milk Marketing Act, Section 3138, p. 11, 1949.
[49]Fed. Trade Comm. Rept. Distribution and sale of milk and milk products in Boston, Baltimore, Cincinnati, and St. Louis. 74th Cong., 2d Sess. House Doc. 501:140–141. June 1936.

for the entire state, and his duties were not confined to auditing. In 1945 and 1947, a second and third man were added to the staff and all dealers' reports are now audited at least quarterly.

The administrators of federal milk orders have placed much emphasis on the auditing of dealers' reports and records of milk utilization. The costs of this service constitute a major part of the total expense of administration.

The auditing procedures carried out by state and federal milk control agencies frequently disclose the need for adjusting payments to producers. Ordinary mistakes and misunderstandings, as well as deliberate attempts to get by with paying less than the orders require, are responsible for errors in computing the orginal payments. Sometimes the audit adjustments are in favor of the dealers, but on the whole they increase the payments to producers.

When a more vigorous program of auditing was introduced by the Connecticut Milk Administrator in 1941, it was found that 72 per cent of the audits revealed discrepancies that required dealers to make some adjustments in their payments to producers. During the years 1941–46, the additional payments to producers through audit adjustments in Connecticut amounted to approximately a half-million dollars. Audit adjustments during 1940–54 raised the net payments to producers in the Niagara Frontier and Rochester areas in New York State to the extent of 0.3 cent and 0.5 cent per 100 pounds, respectively.

These additional payments resulting from audit adjustments are undoubtedly only a small part of the total gains to producers brought about by auditing. The dealers' knowledge that their monthly reports will be audited impels most of them to report their purchases and use of milk as accurately as possible.

Dealers as well as producers have benefited from the auditing done by milk control agencies. Occasional errors resulting in overpayments to producers have been corrected. Product losses from spillage and theft were reduced after the adoption of better accounting methods. Hammerberg reported in 1943, for example, that the auditing program in Connecticut had been a great help to dealers by inducing them to make changes in their accounting practices. He felt that the entire cost of auditing would have been justified if it had done no more than indicate to dealers the possibilities of reducing losses by better accounting.[44]

Various methods have been used to adjust underpayments or overpayments that are disclosed by audits. When the audit adjustments are substantial, they are often paid or deducted in installments. The authors of this bulletin believe that the amounts of the extra payments or deductions should be clearly shown and not disguised by increasing or reducing the prices paid in future periods. The Connecticut milk administrator

[44]Report of the milk administrator, p. 27. State of Conn. March 1954.

requires dealers to pay audit adjustments in separate checks. In Pennsylvania, the policy has been to require dealers to pay the audit adjustments to the milk control commission, which in turn pays the producers concerned.

Effective milk control auditing calls for the services of well trained persons of integrity. In Connecticut, where special emphasis has been placed on the auditing of dealers' reports of their purchases and use of milk, a carefully planned program of in-service training for auditors has been developed. A new employee is first assigned to auditing work in the main office. Later he is transferred to the field, where he is under the supervision of a senior auditor. By gradual steps he assumes more responsibility, until after about 4 years of experience he is qualified to do financial auditing.[45]

In New York State, the need for special training of milk control auditors is recognized by the holding of annual conferences where problems of milk accounting and auditing are discussed.

In states where minimum retail and wholesale prices are fixed, the responsibilities of milk control auditors are especially broad. California includes on its auditing staff persons who have been trained in time and motion study, as well as in other methods of cost analysis. Elaborate and detailed investigations of milk distribution costs are made in that State as a basis for determining the minimum resale prices and spreads. An in-service training program for milk control auditors is considered essential to prepare enough persons for the various tasks and to ensure that reasonably uniform procedures will be followed throughout the State. Periodic meetings of supervising auditors are held as a further means of improving the effectiveness and uniformity of auditing and costing procedures.[46]

Administrative hearings and penalties. It has been an important principle in the administration of milk control that violations should be dealt with as fully as possible without resort to the courts. The milk control agencies are authorized to conduct public or private hearings for the purpose of obtaining evidence on violations, to subpoena witnesses and pertinent records, to decide upon the guilt or innocence of the accused, and to assess penalties.

Several of the milk control laws specify penalties that may be levied upon violators by the milk control agency. Such penalties, frequently referred to as "fines", are illustrated by the following provision of the New Jersey Milk Control Law:

> Any person who shall violate any provisions of this act, or the orders, rules and regulations of the director...shall be deemed guilty of a violation...and shall pay a

[45]Warner, Earl. The state milk control agencies in New England. Vt. Agr. Exp. Sta. Bul. 565:26. 1951.

[46]Campbell, Bruce J. Ann. Meeting Internatl. Assoc. Milk Control Agencies. Proc. 16:55–57. 1952.

penalty of not more than fifty dollars ($50.00) for the first offense and not more than two hundred dollars...for the second and each subsequent offense...

The typical procedure in New Jersey and other states involves an administrative hearing and the imposition of an administrative fine. Then, if the accused does not pay, the case is turned over to the proper authority for prosecution. Under an unusual provision of the New Jersey act, the milk involved in a violation may be seized and sold, the proceeds to be paid into the state treasury.

It has been a rather common practice in some states to impose administrative penalties. This was done quite generally in the early years of milk control. The New York State Division of Milk Control has collected an average of more than $16,000 a year in penalties; in one year, 1937, they were over $37,000. In Pennsylvania, such penalties averaged about $2346 annually during the years 1943–48. On the other hand, monetary penalties have been used very sparingly in other states. Conner cites an unusual incident in Virginia in 1937 when a $25 penalty was imposed on each of several violators in the Harrisonburg market.[47]

Persons found guilty of a violation by the milk control agency in any state may appeal either to a higher administrative authority or to a court. If a dealer refuses to accept the penalty fixed by the milk control agency, the agency will ordinarily start court proceedings to revoke his license or to obtain an injunction.

Revocation of licenses. Each of the milk control agencies is empowered to license milk dealers and to revoke or to refuse to grant licenses in accordance with prescribed rules, after a public hearing. The operation of a milk business without a license is prohibited and makes the violator liable to specified penalties.

In each state except Vermont and Rhode Island, violation of any of the milk control laws or orders, rules, and regulations issued thereunder, is declared to be sufficient justification to suspend, revoke, or deny a license. Except in Maine, New Hampshire, and Virginia, the laws also specify certain other grounds for the revocation or denial of a license. The principal grounds for license revocation listed in most of the state milk control laws are given below:

1. Rejection without reasonable cause or reasonable advance notice of any milk purchased or delivered in ordinary continuance of a previous course of dealing, except where a contract has been lawfully terminated. (Vermont excepted.)
2. Failure to account and make payment for any milk purchased. (Vermont and Connecticut excepted.)
3. Conduct such as to satisfy the control agency of an inability or unwillingness to conduct properly the business of a milk dealer or of intent to deceive or defraud producers or consumers.
4. Being a party to a combination to fix prices contrary to law.

[47]Conner, M. C. The Milk Market Control Law in Virginia. Va. Agr. Exp. Sta. Bul. 444:13. 1951.

5. Failure to keep records or to furnish accurate statements or information required to be supplied to the milk control agency or to producers. (Connecticut excepted.)
6. Insolvency, bankruptcy, or failure to satisfy a monetary judgment imposed by a court. (Massachusetts excepted.)
7. False or misleading statements in the application for a license.
8. Previous responsibility, in whole or in part, for an act on account of which a license may be denied, suspended, or revoked. (Pennsylvania, Vermont, and Rhode Island excepted.)
9. Commission of any act that may demoralize the price structure of milk or interfere with an adequate supply of milk. (Connecticut, Pennsylvania, and Rhode Island excepted.)

The authority to deny, revoke, or suspend licenses is the most powerful enforcement tool in the hands of the milk control agencies. Undesirable persons can be prevented to some extent from entering the industry, and dealers who are flagrant violators can be put out of business entirely. Revocation and suspension of licenses are considered to be drastic measures, however, and are ordinarily not used very extensively by most of the control agencies.

Under the original Connecticut law, revocation of licenses was the only enforcement provision and the reluctance to use this penalty against minor violators caused considerable criticism. Similar criticism was reported in Oregon in 1953. At that time, the milk control agency announced its decision to enforce the code of fair trade regulations, after a change in the milk control law that gave the control agency power to levy fines. The code had not been enforced previously because revocation of licenses was the only penalty, and it was considered too drastic.[48]

Conner reports that the threat of license revocation has been used very extensively by the Virginia Milk Commission. The procedure when there have been repeated violations after warning has been to summon the violator before the commission to show cause as to why his license should not be revoked. The recorded minutes of the commission include many such summons, but very few, if any, licenses have been revoked.[49]

In New York, licenses have been revoked only in the event of willful major violations, although less serious infractions have been considered sufficient justification for refusing to grant or renew a license.

Pennsylvania has revoked licenses for underpayments and delinquent payments to producers and for price-cutting (17 licenses were revoked in approximately 18 months in 1949–50). In the opinion of the commission, however, such action has not been taken unless other forms of correction have proved insufficient. For example, when a field auditor finds a discrepancy in payments to producers, he brings it to the attention of the dealer and suggests that an adjustment be made the following month. If the dealer does not agree with the auditor's findings, a conference is

[48]The Dairy Record, p. 4. July 22, 1953.
[49]Conner, M. C. The Milk Market Control Law in Virginia. Va. Agr. Exp. Sta. Bul. 444:19. June 1951.

arranged with the field supervisor of the district. If the differences cannot be reconciled at this conference, the supervisor refers the case to the commission for a citation hearing. If, after a hearing, the dealer still refuses to make proper restitution to producers, the commission, among other actions, issues an order revoking the milk dealer's license.

Provision for appeals. The milk control law of New Jersey formerly (1941–48) provided for appeals from decisions of the director of milk control to the milk control board.

In Connecticut, provision is made for "reconsideration" of an order. Within 45 days after the effective date of an order or regulation, a person "aggrieved" by the order may petition for reconsideration by the administrator. If relief is denied by the administrator, or if he should refuse to grant reconsideration, an appeal from the order or regulation may be taken to the Superior Court for Hartford County, but such an appeal will act as a *supersedeas* only upon special order of the Court.[59] This procedure is similar to "15–A" proceedings under the federal Agricultural Marketing Agreement Act of 1937. The "15–A" proceedings under the federal act are described as follows:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture stating that any such order...is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing...in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearings, the Secretary shall make a ruling...which shall be final, if in accordance with law.

A state milk control agency or a party "aggrieved" by the agency may, under prescribed procedure, appeal to a higher authority. Rights of appeal to the courts are determined by the laws of each state. A typical provision for appeal appears in the Pennsylvania Milk Control Law. Within 20 days after the effective date of an order, rule, or regulation, any person aggrieved may appeal to the Common Pleas Court of Dauphin County. But no such appeal is permitted to act as a *supersedeas,* except on order of the Court. Another section states that a special order of the Court permitting an appeal to act as a *supersedeas* may be made only after reasonable notice to the commission. The appellant is required to file a bond with enough sureties to protect producers while the appeal is pending. This act gives much more detailed guidance than most acts to both the appellant and the commission in cases of appeal.

An important distinction is made in the Pennsylvania act with respect to appeals of quasi-judicial and quasi-legislative orders. An order of the commission that applies only to the particular person or persons named therein (a quasi-judicial order), may be appealed to the Superior Court "in the manner provided by law", but a general rule, regulation, or order (a quasi-legislative order), may be appealed to the Supreme Court—*i.e.,* the highest court in the State.

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[59] *A supersedeas* would defer the enforcement of the order until the appeal has been acted upon.

In New Jersey, the filing of an appeal from a price-fixing order acts as a stay of enforcement unless the Court determines otherwise. This is the opposite of the Pennsylvania provision cited above, where an appeal does not prevent the carrying out of the order unless the Court so directs.

The Virginia statute, like that of Pennsylvania, distinguishes between an order of the commission that applies to a particular person or persons only and one that fixes milk prices or is a rule, regulation, or order of a general nature. Appeals by aggrieved persons in the former instance may be taken to the Virginia Supreme Court of Appeals; in the latter, appeals must go to the Circuit Court of the city of Richmond. Thus, the Virginia procedure is the reverse of that in Pennsylvania; appeals from orders applying to individual persons go to the lower Court in Pennsylvania and to the higher Court in Virginia. In Virginia, as in Pennsylvania, appeals do not act as a *supersedeas* unless so ordered by the Court.

Somewhat similar provisions are made by the Connecticut and New York laws when an applicant for a license is aggrieved by the milk control authority. In Connecticut, the aggrieved person may appeal to the Superior Court of the county in which he resides. An appeal from an adverse ruling of the administrator about a license acts as a *supersedeas* of the ruling unless the administrator successfully petitions the Court to determine that it shall not. The Court may not permit the ruling to act as a *supersedeas* unless the appellant files bond for the protection of producers. The New York law provides that the action of the commissioner in refusing to grant or renew a license may be reviewed by the courts if a request is filed within 30 days.

The Maine Milk Control Law contains a clear statement concerning the responsibility of a Superior Court before which an appeal from an order of the commission is pending. When in his opinion justice requires it, the judge "may order a suspension of or compliance with such order, or with such order as modified by the commission pending the determination of such appeal".

Massachusetts and Pennsylvania concede the right of an appellant to request the control agency to exercise on the appellant's behalf its powers to compel the attendance of witnesses and the production of books and records.

The states differ as to what a court may do if it thinks the control agency is in the wrong. In Massachusetts, the Supreme Judicial Court may revise or reverse any decision of the milk control board "if satisfied that the same was clearly wrong". The Pennsylvania Supreme Court decided that, if the Common Pleas Court should determine that an order of the commission was unreasonable or illegal, it should remit the case to the commission with directions to reform the findings or order or to revoke the order. The Court was not to assume the responsibility for revision.

The New Jersey law referred to previously, which provides that an

appeal is an automatic *supersedeas* unless otherwise ordered by the Court, was adopted by amendment in 1948. Formerly, the milk control board served as an appeals board and the proceeding was less cumbersome.

Injunctions. The milk control agencies in Connecticut, New York, Pennsylvania, and Virginia are specifically authorized to apply to a court of record for relief by injunction without being compelled to allege or prove that an adequate remedy at law does not exist. When a court has granted an injunction requiring a milk dealer to comply with a certain regulation, failure to obey amounts to contempt of court and subjects the violator to penalties that can be quite severe. The use of injunctions against violators has been a favored method for enforcing milk control regulations. This has been especially true in the enforcement of federal orders, because dealers are not licensed by the federal authorities and the possibility of enforcement by license revocation does not exist.

The milk administrator in Connecticut commented as follows concerning the use of injunctions:

> This method insures, when used assiduously as it must be, an efficient and most desirable means of enforcement. It eliminates duplication in costs and insures uniformity of results; and what is more important, it seeks and will effect compliance without demanding a money penalty and without branding a violator a criminal.[81]

Criminal action. The ultimate enforcement procedure authorized by the milk control laws is criminal action. Commonly, the violation of a milk control law is designated as a misdemeanor, and either a fine or jail sentence is a possible consequence. Fines were assessed profusely by the courts in some states during the earlier period of regulation; in other states fines have been levied by the courts sparingly.

Jail sentences for violation of the milk control law are uncommon. The director of milk control in Massachusetts reports two occasions on which jail sentences were imposed upon dealers. In both instances, however, the violators made peace with the control board and the court, and the sentences were suspended. A jail sentence in a case of contempt of court that was imposed in the early enforcement of the Boston federal order seemed to bring about much greater compliance in that area.

Criminal action against violators of the milk control laws has usually been undertaken only as a last resort in particularly flagrant cases. Administrative penalties, license revocation, and injunction procedure have been adequate remedies in most instances.

Legal services

Some of the state milk control agencies have had the services of capable and experienced attorneys who have played an important part in the development of milk control legislation and in the litigation of significant cases. On the other hand, administration and enforcement of milk control in many states have suffered from the lack of adequate legal aid.

[81] Hammerberg, D. O. Report of the milk administrator, p. 11. State of Conn. 1941.

Legal services for milk control have been supplied in many states by the office of the attorney general. Where the amount of legal work on milk control is substantial, as in Pennsylvania, a member of the attorney general's staff usually has been assigned to work with the milk control agency, but in many states, legal cases are merely referred by the milk control agency to the attorney general for attention. The latter arrangement is likely to be unsatisfactory. It is difficult to develop and maintain sufficiently close collaboration between the milk control specialists and attorneys on that basis. Moreover, if the legal work on milk control is handled by various members of the attorney general's staff, it is unlikely that any of them will become sufficiently well acquainted with milk control legislation and milk industry problems to function very effectively in this field.

In New York State, where the Division of Milk Control is in the Department of Agriculture and Markets, a member of the legal bureau of the department is assigned to work with the milk control division.

State milk control agencies that have required relatively little legal service, usually have employed outside lawyers as needed, or have retained counsel on a part-time basis. Until recently this was true in New Jersey, but now the legal work on milk control in that state is handled by the attorney general's office. In Rhode Island, the milk control board has had a special legal adviser on a retainer basis, but the recent administrative reorganization study in that state led to a recommendation that the legal work on milk control be done by the attorney general's office.

Milk control administrators have not always appreciated the importance of good legal advice in preparing orders, conducting hearings, and other administrative procedures outside the courts. Such timely participation by legal counsel may be fully as important as the capable handling of litigation. Whatever the arrangement for providing it, good legal advice should be conveniently available to the milk control agency at all times and not merely for the handling of cases that go to court. It is of great advantage to a milk control agency to have the services of an able attorney who is adequately informed on technical and economic aspects of the milk industry, and has a thorough knowledge of milk control legislation.

Legal Issues and Court Decisions[52]

Constitutionality of milk control laws

When state milk control laws were first enacted in the early 1930's, there were serious doubts about their constitutionality. Members of the United States Supreme Court were divided in their opinion of the validity of

[52]Standard abbreviations are used in citing court cases: Official reports of the United States Supreme Court are abbreviated U. S. Example: 336 U. S. 525. This means Volume 336, United States reports, page 525. References to *Fed.* or *F.* are to the Federal Reporter, containing the decisions of

such regulatory legislation. During the 1920's when the states attempted to regulate trade in ice, theater tickets, and gasoline, the majority had decided against such regulations. However, a determined minority had insisted that the United States Constitution did not prohibit needed regulation of a private business by the states, even though such business was not included among those traditionally regarded to be "affected with a public interest". Under the circumstances, it was quite uncertain whether the new milk control laws would be upheld by the highest Court or declared unconstitutional on the ground that they violated the "due process of law" clause of the Fourteenth Amendment.[53]

The first case involving milk control legislation to reach the United States Supreme Court was the Nebbia case.[54] This case dealt with the legality of the New York Milk Control Law of 1933. In a 5-to-4 decision rendered in March 1934, the Supreme Court upheld the legality of the New York law.

The serious constitutional question in the Nebbia case was whether the New York Milk Control Law was valid under the Fourteenth Amendment. The minority argument was that prices could not be fixed unless the business regulated was either: (1) a monopoly; (2) "of a sort which the public itself might appropriately undertake"; or (3) "one whose owner relies on a public grant or franchise for the right to conduct the business". The majority opinion insisted that none of these were essential, and that there is no closed class or category of businesses "affected with a public interest".

In deciding the question of constitutionality in the Nebbia case, much reliance was placed upon the findings of the state legislative committee which had investigated the milk industry in New York and concluded that under the circumstances, regulation of prices was necessary on a temporary basis.[55]

Although counsel for the State of New York relied heavily on argument that emergency conditions made it necessary to regulate the pricing of milk in the public interest, the majority opinion indicated that the Court's decision in the Nebbia case was based on broader grounds. The Court evidently was ready to approve of public regulation of any business conducted in such fashion as to inflict injury upon the public at large, or upon any substantial group.

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the lower federal courts to 1924. These decisions after 1924 are reported in Fed. (2d) or F. (2d) (Federal Reporter, second series) except that since 1933 the Federal District Court decisions are separately reported in *F. Supp.* (Federal Supplement). Reports of the various State Supreme Courts are cited by abbreviations of the state's name. Example: 88 N.H. 296. The additional citations of State Supreme Court cases refer to the Atlantic Reporter (Atl.), the Northeastern Reporter (N.E.), etc.

[53]The limiting provision of the Fourteenth Amendment is as follows: "...nor shall any State deprive any person of life, liberty, or property, without due process of law..." Art. XIV, Sec. I, United States Constitution.

[54]*Nebbia v. New York*, 291 U.S. 502 (1934).

[55]See the Report of the Joint Legislative Committee to Investigate the Milk Industry, New York Legislative Document No. 114 (1933).

Concerning this, the Court said in part:

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of government interference. But neither property rights nor contracts are absolute; for government can't exist if a citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.

If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard to the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those employed in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people. Price control, like any other form of control, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

The Nebbia case quickly was recognized as a leading constitutional decision ranking with that of Munn v. Illinois.[56] In the Munn case, monopoly had been the evil. In the Nebbia case, maladjustments in prices and incomes were the cause of regulation by legislative action. If a state decides that direct price-fixing is appropriate, it may adopt such a policy by virtue of its police power.[57]

Although the Nebbia case arose with respect to an order fixing resale prices, the decision seems to have been broad enough to establish also the constitutionality of fixing prices paid producers for milk. Thus, a firm legal foundation for milk price control was laid as early as 1934. This important decision, however, was only the beginning of a long series of legal issues, both constitutional and administrative, that have been taken to court in the states having milk control laws.

The Virginia Supreme Court of Appeals, in November 1934, held unconstitutional the Virginia Milk and Cream Act, an emergency measure which had been adopted in March of that year. In March 1935, however, the same court, on rehearing the case, overruled its earlier decision and sustained the constitutionality of the act.[58] The United States Supreme Court affirmed the constitutionality of the Virginia Milk and Cream Act in 1937 in the case of Highland Farms Dairy v. Agnew.[59] In this case, the Court restated in broad terms its opinion in the Nebbia case. It reasserted: "...the power of the state to fix the price for milk in order to save

[56] *Munn v. Illinois*, 94 U. S. 113 (1876).
[57] Mund, Vernon A. Government and business, p. 469–493. 1950.
[58] *Reynolds et al. v. Milk Commission*, 163 Va. 957 (1935).
[59] *Highland Farms Dairy, Inc., et al. v. Agnew*, 300 U. S. 608 (1937).

producers, and with them the consuming public, from price-cutting so destructive as to endanger the supply."[60] (The minority opinion in the Nebbia case pointed out that positive evidence of an endangered supply of milk was not shown.)

Most other cases involving the constitutionality of milk control laws were decided favorably in the highest courts of the several states. Among the northeastern states, this happened in Pennsylvania, New Jersey, Vermont, and Massachusetts.[61] During the years 1936 to 1939, milk control laws were likewise declared constitutional in Alabama, Georgia, Florida, Indiana, California, Oregon, and Wisconsin.[62]

In 1951, the Georgia Milk Control Law was declared unconstitutional by the State Supreme Court in the case of Harris v. Duncan.[63] This decision rejected the pertinence of the United States Supreme Court decisions upholding the constitutionality of the New York and Virginia laws. It also disregarded previous decisions of the same court in which the constitutionality of the law had been upheld, as well as the decisions of the highest courts of other states respecting similar legislation. The basis for holding the Georgia law invalid was its violation of the "freedom of contract". The chief justice of Georgia concluded "...that the constitutional guarantee of due process would forbid any action that curtails free competition or impairs the value of private property". Elaborating upon this theme, he continued, "...to deprive a free citizen of the right to agree upon a price which he will accept for his private property is to rob him of the most valuable element of that property and to render private property ownership a farce". In conclusion, the chief justice asserted that such legislation as the milk control law "...could ultimately convert Georgia into a socialistic state despite the plain provisions of the constitution which forbid such".

The Georgia legislature, however, passed a new milk control act early in 1952. The peculiar nature of the Court's decision necessitated a peculiar law. The new law represents an attempt to restore the "freedom of contract". Elaborate provisions are set forth for written contracts relating to the purchase and sale of milk. As a guide to dealers for making contracts, the milk control board is required to determine the prices that will protect the milk industry and be most in the public interest, and to establish by order the prices recommended for each market. If any milk

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[60] In the case of *In re Swanton Market Area*, 112 Vt. 285 (1942), the Vermont State Supreme Court held that, before the milk control board could legally fix prices for milk or cream in any specified marketing area, it must find from the evidence that there had occurred in such area a loss or substantial lessening of the milk supply. It was considered insufficient for the board to find that a loss or substantial lessening of the supply of milk of proper quality was *likely* to occur in the future.

[61] See: (a) *Rohrer v. Pennsylvania Milk Control Board*, 322 Pa. 257; 186 Atl. 336 (1936).
(b) *State of New Jersey ex rel. State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504; 179 Atl. 116 (1935).
(c) *State v. Auclair*, 110 Vt. 147; 4 Atl. (2d) 107 (1939).
(d) *Mass. Milk Control Board v. Gosselin's Dairy, Inc.*, 301 Mass. 174; 16 N.E. (2d) 641 (1938).

[62] A list of court cases in which the constitutionality of milk price control under state laws was upheld is given in the *Proceedings of the Sixth Annual Meeting of the National Association of Milk Control Agencies*, October 1940, pp. 10–12.

[63] *Harris v. Duncan*, 208 Ga. 561 (1951).

is delivered without a proper contract, the dealer must pay for it in accordance with the minimum prices specified in the orders of the milk control board.

This new law also was brought under attack in the lower courts during the latter part of 1952. When the attack was begun upon the price-fixing powers of the board, the chairman stated publicly that the board possesses no price-fixing powers except those surrendered. He said dealers, producers, and consumers may enter into any price agreement they choose, "...and the board will have to recognize the price set by those participating in the agreement. The board has the power to set the price of milk for all parties not covered by a written agreement...", but up until July 1953, not a single agreement had been filed with the board.[64]

Delegation of legislative power. In New Hampshire, Maryland and Washington, the original milk control laws were declared unconstitutional largely because of indefiniteness or too broad delegation of legislative power. These early decisions side-tracked the milk control programs in Maryland and Washington, but as indicated below, the New Hampshire law was amended and re-enacted.

The Maryland decision is of interest because of the grounds given by the Court for considering the law defective.[65] The exercise of the power to fix milk prices in Maryland had been made expressly contingent upon a request being made "by a substantial proportion of the producers and/or consumers and/or distributors" in any marketing area. The Court decided this provision was so defective on grounds of delegation of legislative power that it was not necessary to consider whether it was void as violative of property and contract rights. The Court found a "serious difficulty arising from the attempted delegation, under an inexplicit phrase, to an uncertain group, of the right to invoke and make operative the broad powers which the statute describes". The Maryland Court objected especially on the ground that the delegation was "not to the voters of a political subdivision or of a described locality, but to an indefinite portion of producers, consumers and distributor classes, in areas having no legislative description".

In Washington, the regulation of milk prices under an act which was patterned after the Federal Agricultural Adjustment Act of 1933 was declared unconstitutional by the State Supreme Court in 1935.[66] In this case, the Court's complaint was that the legislature had delegated legislative power to "a special privileged group of private persons".

The New Hampshire Milk Control Law also was declared unconstitutional in 1936.[67] The opinion in this case dealt with the broad question of delegation by the legislature to an enforcement agency by stating "its

[64]Dairy Record. p. 15. July 22, 1953.
[65]*Maryland Cooperative Milk Producers, Inc. v. Miller*, 170 Md. 81; 182 Atl. 432 (1936).
[66]*Griffiths et al v. Robinson*, 43 Pac. (2d) 977 (1935).
[67]*Ferretti v. Jackson*, 88 N. H. 296; 188 Atl. 474 (1936).

commands...in such broad terms as to leave the enforcement agency with unguided and unrestricted discretion in the assigned field of its activity". This decision is to be distinguished from the Maryland and Washington cases mentioned above, wherein the chief ground for objection was delegation to privileged groups of private persons. Delegation to private groups was not a question in this case.

The New Hampshire law was substantially amended to meet the requirements of an advisory opinion granted by the New Hampshire Supreme Court as to what sort of standards would be acceptable. The revised act of 1937 states: "Whenever the board shall determine...that the public health is menaced, jeopardized or likely to be impaired or deteriorated by the loss or substantial lessening of a supply of milk of proper quality ...the board shall fix the just and reasonable minimum or maximum prices, or both..." This provision probably resulted from a statement in the Supreme Court's advisory opinion that the power of the milk control board to establish prices was "dependent on the prevalence of an economic condition injurious to public health in a definite marketing area, and (that) the existence of this condition in such area must first be found as a fact after public notice and hearing". This emphatic reference to public health did not imply that the New Hampshire board was to assume the role of a public health body. There has been a studious effort on the part of milk control boards to avoid becoming involved in any aspect of milk sanitation, yet the relation of economic conditions in the dairy industry to the health of the community is considered an important aspect of milk control from a constitutional point of view.

In response to the early decisions against legislative delegation of authority to "private groups", Maine, New Hampshire, and Vermont eliminated the producer- or dealer-petition features of their laws as conditions precedent to action by their state milk control authorities.[68] At about this same time, however, the New York law was amended to provide: (1) for a producer petition before the control agency could call a hearing to consider fixing prices in any market, and (2) for approval by two-thirds of the producers affected before a proposed order may become effective. These provisions have not been successfully challenged in the New York courts. The provision for producer approval in the Federal Agricultural Marketing Agreement Act of 1937 was upheld by the United States Supreme Court in the Rock Royal case in 1939.[69]

An important decision of a lower state court on the question of delegation of legislative power occurred in Pennsylvania in 1939. The milk control law which directed the commission to fix the minimum prices to be paid by milk dealers left to the discretion of the commission the decision as to whether or not to fix the prices for milk used solely in

[68]Proceedings of the Sixth Annual Meeting of the National Association of Milk Control Agencies, p. 27, 1940.
[69]*United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533 (1939).

manufacturing. A dairy company in Pittsburgh contended this discretionary power over the fixing of prices for manufacturing milk was an unconstitutional delegation.[70] This was vigorously denied by the Common Pleas Court of Dauphin County. This decision was later upheld by the Pennsylvania Supreme Court. The Court's opinion states that the legislature "...has not delegated its power to make law, but has delegated power to determine facts and apply the intention of the legislature to the facts thus determined".

The question of delegation of legislative power, along with two other issues was involved in a case decided by the Virginia Supreme Court in June 1950.[71] Specifically the three points of attack listed were: (1) delegation of legislative power to private individuals (meaning the members of the commission and the local milk boards); (2) denial of due process through the fact that two of the three members of the commission and four out of five members of each local milk board were required to be producers or other industry representatives; and (3) the emergency no longer existed and therefore this extraordinary use of the state's police power was no longer warranted. The plaintiffs contended that these issues had not been considered in earlier cases involving the constitutionality of the Virginia Milk and Cream Act.

The delegation of power, according to the Virginia Supreme Court's opinion, was not to private individuals, but to an official body, created by law. "The proper performance of...[assigned] duties", the Court said "requires that the officials [appointed] shall act in good faith..." The provisions of the act [including the right of appeal] fully protect the rights of any party affected..." On point 3, the Court said that the existence of an emergency is not basic to the constitutionality of the law. (The words "...of public emergency" had been omitted when the act was codified in 1948.) The constitutionality of the act, the Court said, rests upon the fact that the milk business "is affected with a public interest".

A challenge of the constitutionality of the New Jersey Milk Control Law was successfully met as recently as 1950 in the case of Como Farms v. Foran.[72] A price-fixing order of the Office of Milk Industry was appealed by Como to the Appellate Division of the New Jersey Superior Court. Among other things, it was contended that the revised milk control act of 1941 delegated price-fixing power to the director without laying down a sufficient legislative standard to guide him. The Court ruled that the legislative provision to the effect that the director "may" in fixing prices "take into consideration the various grades of milk produced, the varying percentages of butterfat, plant volume, seasonal production, and other conditions affecting the costs of production, transportation and market-

[70] *Rieck-McJunkin Co. v. Milk Control Commission*, Common Pleas Court, Dauphin County, No. 815, Commonwealth Docket, 1939.

[71] *Board of Supervisors of Elizabeth City County, Virginia v. State Milk Commission*, 191 Va. 1 (1950).

[72] Decided jointly with the *Port Murray Dairy Co.* case, 6 N. J. Super. 285 (1950).

ing, and the amount necessary to yield a reasonable return to the producer and to the milk dealer, processor or subdealer" actually imposed a duty upon the director to consider these factors.

In addition, the Court held that independently of this requirement, that provision of the law which authorized the director to

> ...supervise, regulate and control the entire milk industry...including the production, importation, classification, processing, transportation, disposal, sale or resale, storage or distribution of milk...in those matters and in every way necessary to...control or prevent unfair, unjust, destructive or demoralizing practises which are likely to result in demoralization of agricultural interest...or interfere with the maintenance of a fresh, wholesome supply of sanitary milk,...

was of itself a legally sufficient standard to guide the director.

Scope of state and federal authority

State authority in pricing milk that moves from one state to another. When the power of state and federal governments to regulate milk prices was firmly established, a number of cases arose in which certain milk dealers and cooperatives claimed exemption from the regulations. This type of attack was based mainly upon the question of where or from whom milk was purchased, or where or to whom it was sold. Thus it was necessary to determine if a state control agency might regulate the prices paid to producers in another state. This type of issue first arose when the New York Milk Control Board attempted to regulate the prices paid Vermont farmers for milk sold in the New York City market. The original New York Milk Control Law prohibited the sale within the state of milk that was purchased out-of-state at a price less than the minimum price fixed for payment to New York producers under similar conditions.

In the case of Baldwin v. Seelig, the power of a state to interfere with interstate commerce in this manner was denied by the United States Supreme Court.[73] The Court held that such a barrier to traffic between the states was prohibited by the interstate commerce clause of the United States Constitution, and that neither the police power nor the taxing power of a state is to be used with the aim and effect of establishing an economic barrier against competition of products from other states. The Court said "...the Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the people of the several states must sink or swim together, and that in the long run, prosperity and salvation are in union and not division".

If a state milk control agency has no power to fix the price paid producers in another state, does it have power to fix prices charged consumers for milk imported from another state? In the case of Highland Farms Dairy v. Agnew, the United States Supreme Court held that it was consti-

[73] *Baldwin v. Seelig*, 294 U. S. 511 (1935).

tutional for the Virginia State Milk Commission to establish wholesale and retail prices for milk sold in Virginia by a dealer located in Washington, D. C.[74]

However, an attempt by the New Jersey milk control agency to introduce regulations in addition to minimum retail and wholesale prices upon milk imported from other states was rejected by a lower state court as a violation of the federal constitution.[75] The New Jersey regulation, (F–16, issued in June 1949) ordered that a dealer, before selling any milk purchased from outside the State, must file a certified report with the New Jersey Office of Milk Industry, stating the quantity of milk purchased, the name of the seller, the number of the permit issued to the seller by the New Jersey Department of Public Health, and a certificate by the seller indicating his sources of supply.

The Court first pointed out that, if this were intended to be a health measure, it is beyond the power of the director of the Office of Milk Industry. "...Viewed as an economic measure...it offends the federal Constitution." Describing the practical effect of this regulation, the Court said that under regulation F–16: "Pennsylvania milk (arriving at Atlantic City) cannot be sold until: (1) the distributor receives from the creamery in Bucks County, Pennsylvania, a certificate of the sources of supply, and (2) until the distributor files in Trenton the certificate and certain other information." This case was not reviewed by the New Jersey Supreme Court.[76]

The authority of a state to regulate the activities of a milk dealer engaged in interstate commerce was tested on a somewhat different basis in the case of the Pennsylvania Milk Control Board v. Eisenberg Farm Products.[77] Eisenberg operated a milk plant at Elizabethville, Pennsylvania, from which milk was shipped to New York. He refused to comply with requirements of the state milk control act that he obtain a license, furnish bond to guarantee payments to producers, and pay fixed minimum prices. He relied heavily upon the previous decision of the United States Supreme Court in the case of Baldwin v. Seelig to support his position.

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[74] *Highland Farms Dairy, Inc., v. Agnew*, 300 U. S. 608 (1937).

[75] *Matter of Appeal of Port Murray Dairy Company and Others*, 6 N. J. Super. 285 (1950).

[76] In the case of *Dean Milk Company v. City of Madison*, (340, U. S. 349, 1951), the United States Supreme Court held that the city of Madison, Wisconsin, could not require its milk to be pasteurized at plants located within a 5-mile radius. The Dean Milk Company operated plants in Illinois and shipped pasteurized milk more than five miles to Madison, Wisconsin. The United States Supreme Court also indicated indirectly its disapproval of the requirement that all milk used in the city be produced on farms within a 25-mile radius.

The United States Supreme Court considered the Madison ordinance to be in conflict with federal power over interstate commerce. The Court said in part, "...one state, in its dealings with another may not place itself in a position of economic isolation". Various alternatives were suggested, such as charging for inspection services at plants or farms beyond the specified distances.

Three justices dissented in this case, stating that: "Since the days of Chief Justice Marshall, federal courts have left states and municipalities free to pass bona fide health regulations, subject only to the paramount authority of Congress if it decides to assume control..." "This decision", the dissenting justices said, "...elevates the right to traffic in commerce for profit above the power of the people to guard the purity of their daily diet of milk".

[77] *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346 (1939).

In the Eisenberg case, the United States Supreme Court ruled that Eisenberg must comply with the requirements of the Pennsylvania law even though his milk was shipped out of the State. The effect of these regulations upon interstate commerce was regarded as incidental and not forbidden in the absence of regulation of the same commerce by Congress.

The decision in this case was interpreted by many as giving a free hand to the state milk control agencies to regulate the prices of milk purchased in the respective states for shipment to markets in other states. It should not be overlooked, however, that the primary issue in the Eisenberg case was licensing and bonding rather than price regulation, and that the *incidental* effect of the state regulation upon interstate commerce was emphasized in the decision. It seems unwarranted to assume that the United States Supreme Court would not object to a plan of state regulation of prices paid for all milk shipped to a specified marketing area in another state or to a system of coordinated regulation of the prices paid by dealers in New York and Pennsylvania for milk shipped into New Jersey. It is doubtful whether the United States Supreme Court would regard such regulation by the states as constituting only an incidental burden upon interstate commerce.

State authority in pricing milk that is sold to federal agencies or on government reservations. A complex though relatively unimportant legal issue arose in connection with attempts by the states to fix prices of milk being sold to agencies of the United States government, such as army camps. One such case originated in Pennsylvania when a milk dealer at Lancaster obtained a contract to supply milk to an army training camp at a price 3.5 mills lower than the fixed minimum price per one-half pint. In this instance, the camp was located on a military reservation owned by the commonwealth of Pennsylvania and not ceded to the federal government.[78] The case was first tried in the Pennsylvania Common Pleas Court of Lancaster County, and the decision was that bids must be submitted to conform with minimum prices fixed by the milk control commission. The dealer lost his case also in the higher Pennsylvania courts, and then carried it to the United States Supreme Court.[79] The question before the Supreme Court was understood to be: "whether the minimum price regulations of the Pennsylvania Milk Control Law may constitutionally be applied to the sale of milk by a dealer to the U. S. government".

The federal government, as intervener in this case, relied heavily upon the congressional statute which directs that contracts be awarded to the "...lowest responsible bidder for the best and most suitable articles". The Supreme Court concluded, however, that the Pennsylvania Milk Control Law had only the effect of placing all bidders on an equal footing

[78]Land is "ceded" if the state legislature has granted the U. S. government sovereign powers of government over it. Mere sale or lease of land to the United States does not involve cession.
[79]*Penn Dairies, Inc., et. al. v. Milk Control Commission of Pennsylvania,* 318 U. S. 261 (1943).

with regard to the minimum price. It also said that if a federal agency is not located on ceded land, the state has the power to regulate the prices charged by dealers.

An earlier decision of the Supreme Judicial Court of Massachusetts, and also one by the New Jersey Supreme Court,[80] had supported state control of such prices, but these decisions did not bring out the interesting distinction made by the United States Supreme Court in the Penn Dairies (Pennsylvania) case, that is, whether the federal agency was located on ceded land.

Precedents for permitting the application of state milk control regulations were found also in the cases involving nondiscriminatory regulation or taxation of contractors furnishing supplies or rendering services to the government. Certainly, in the absence of congressional legislation, the Constitution alone does not immunize contractors servicing governmental agencies from local price-fixing regulations. While there is a constitutional immunity of the national government from state regulation of the performance by federal officers and agencies of governmental functions, those who contract to furnish supplies or services to the government are not governmental agencies, and do not perform governmental functions.

On the same day the United States Supreme Court decided the Penn Dairies case, it also decided a California case involving a somewhat similar issue.[81] In this case, the Court denied the right of the California Department of Agriculture to revoke the license of a milk dealer for selling milk for less than the fixed minimum price at Moffett Field. Moffett Field was an army installation situated on land ceded by the state of California to the United States.[82]

That this contradictory and unsatisfactory distinction ought not to continue to stand was suggested strongly by Justice Frankfurter in a dissenting opinion in the California case. "Cession" of sovereignty over land by a state to the federal government, he pointed out, is not usually complete. In the case of Moffett Field, the state retained the right to serve civil and criminal process on the land ceded. The boundaries between federal and state power are not absolute. "Nothing is to be gained", wrote Justice Murphy, who also dissented, "by making federal enclaves thorns in the sides of the states".

The decision in Pacific Coast Dairy case places a burden on all state agencies who exercise resale price-fixing authority to ascertain: (1) what land within the state boundaries has been ceded to the United States, as distinguished from a mere purchase or condemnation, and (2) on what land and at what point was the particular cut-price sale completed? Some

[80] *Mass. Milk Control Board v. Gosselin's Dairy, Inc.*, 301 Mass. 174; 16 N. E. (2d), 641 (1938), and *Patterson Milk and Cream Co., Inc. v. Milk Control Board*, 118 N. J. 383; 192 Atl. 838 (1937).

[81] *Pacific Coast Dairy, Inc. v. Department of Agriculture of California et al.*, 318 U. S. 285 (1943).

[82] This distinction apparently had been first made by a Florida Circuit Court judge, in the cases of *Milk Commission v. J. C. Alderman* and *Milk Commission v. Tampa Bettermilk Producers' Cooperative* (1942).

military reservations are in part on ceded land and in part on land acquired later to which no cession from the state legislature has been obtained. The question of jurisdiction depends on ascertaining on what part of the reservation the delivery of the milk was finally completed. It might happen that the fixed minimum price would apply to part of a load of milk and not to the remainder.

Thirty other states joined California's petition for a rehearing in the Pacific Coast Dairies case, but a rehearing was denied by the United States Supreme Court.

Federal authority in pricing milk that is produced and sold within a state. This discussion relates primarily to legal issues and court decisions involving state milk control programs, but it would be incomplete without mention of certain court cases dealing with federal regulation of milk prices This is true especially of those court cases involving the power of the federal government to regulate the prices paid for milk produced and sold within a state and not transported across state lines in its movement to market.

Probably the most important court decision involving this question was the Wrightwood case, decided by the United States Supreme Court in 1942.[83] This case arose in connection with the federal milk marketing order for the Chicago market. Wrightwood Dairy Company, a handler in the market, refused to comply with the provisions of the order on the grounds that its business was entirely intrastate and that consequently the federal statute did not apply. The United States government sought an injunction to restrain Wrightwood from violating the order. The question to be decided by the Court was whether prices fixed in this order by the United States Secretary of Agriculture were applicable to milk produced and handled entirely within the state of Illinois.

The United States Supreme Court upheld the order as it applied to the operations of the Wrightwood Dairy. It asserted that the reach of federal power over interstate commerce "...extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power". Evidence showed that 60 per cent of the Chicago supply was produced in Illinois and 40 per cent in other states. The Chief Justice, as shown by his written opinion, was impressed by the evidence that it was essential to regulate intrastate milk in order to make the regulation of interstate transactions in milk effective. Failure to do so would tend to cause the breakdown of federal control throughout the market.

The extent of the federal government's powers over intrastate commerce in milk was the subject of two cases in federal district courts in Ohio.[84] In a Cleveland case, the district court held that a quantity equal to one-half of 1 per cent of the receipts of milk in the market coming

[83] *United States v. Wrightwood Dairy Co.*, 315 U. S. 110 (1942).
[84] *Balazs et al. v. Brannan*, 87 F. Supp. 119 (1949); and *Allen Milk Company et al. v. Brannan*, Federal District Court, Southern District of Ohio (not reported).

from out-of-state sources was "substantial" and not "inconsequential".

In a sense, the decision in the Columbus case (Allen Milk Company et al. v. Brannan) goes to the logical conclusion that it is not essential to find *any* actual interstate movement of fluid milk to justify federal regulation of fluid milk prices in a given market. There, the decision in support of the federal order was based upon the fact that, in the 15-county production area, large quantities of milk are supplied to manufacturers of milk powder, baby food, butter, and other products that were sold in interstate commerce; and upon the further fact milk was purchased for the Columbus market in competition with plants that were engaged in interstate commerce. This case arose through appeal from the finding of a judicial officer of the Department of Agriculture in a proceeding under Section 15–A of the Agricultural Marketing Agreement Act. In his ruling, Judicial Officer Flavin said:

> Too, here are present the effects of Columbus handling upon other orders issued under the act regulating the Cleveland and Dayton-Springfield markets and upon the Evaporated Milk Marketing Agreement...which regulates the evaporated milk industry throughout the United States... Lack of an adequate marketing plan in a sizable fluid market has repercussions in the national market for milk and its products that are undesirable from the standpoint of the policy of the act and tend to defeat its objectives ...the promulgation record shows that conditions in the Columbus fluid market have a dominant influence upon the prices paid for all milk produced in the area....

These District Court decisions in Ohio, which for special reasons were not appealed, indicate that the federal authority under the Agricultural Marketing Agreement Act of 1937 is broad enough to permit the regulation of milk prices by federal orders in practically any marketing area of the country. Federal milk orders have, in fact, been promulgated for several markets that have little or no interstate commerce in milk in the usual sense.

Trend toward increasing federal authority. In general, the effect of court decisions in cases relating to the scope of state and federal authority to regulate milk prices, has been to greatly restrict the state milk control agencies while giving free reign to the federal government. It is now clear that the state milk control agencies can effectively regulate dealers' buying prices only with respect to markets that receive little or no milk from other states. The number and importance of such intrastate markets is steadily decreasing. Health department regulations do not restrict the sources of market milk as much as formerly; transportation by tank trucks and refrigerated vans has become more rapid and dependable; and the packaging of milk in lightweight paper containers facilitates distribution over wider areas. The result is that an increasing proportion of the milk supply becomes involved in interstate commerce.

At present the regulation of retail and wholesale prices of milk and cream is left entirely to the states, but only 11 states are exercising such authority under their milk control laws.

Legal requirements with respect to hearings

Many legal issues have been decided by the courts concerning the necessity for and the nature of public hearings. The basic principle is that, unless specified by statute, it is not necessary under due process of law to hold a hearing in quasi-legislative or rule-making proceedings.[85] The New Jersey Court of Errors and Appeals so stated in a milk control case decided in 1935.[86] In that case, the Court determined that:

> In the absence of a specific constitutional or statutory requirement thereof, notice of proceedings before the subordinate body exercising...the administrative function is not requisite to valid action... Nor is a hearing required in the absence of a provision therefor in the organic or statutory law. The due process clause of the Fourteenth Amendment imposes no such requirement... Such regulation is purely a legislative function...

Other state and federal courts have often distinguished between quasi-legislative and quasi-judicial functions, and have made clear the principle that, in the absence of statutory or constitutional requirements, notice and hearing are essential only in quasi-judicial proceedings. As the milk control laws of all of the northeastern states now require hearings before price-fixing orders are issued, and since hearings commonly were held even when not required by statute, this principle is mainly of academic interest. More important are the requirements in the various states relative to the conduct of hearings and issuance of orders.

An important Pennsylvania case throws light on the legal requirements for milk control hearings in that State.[87] In the case of Colteryahn Sanitary Dairy v. Milk Control Commission, the Pennsylvania Supreme Court laid down the following guiding principles to be used by the agency:

(1) Whenever a price-fixing order is issued, a general statement of findings of fact together with reasons for the order must be filed.

(2) The same procedure is required for changing or revising an order fixing prices as in promulgating an order.

(3) The production of proof before the milk control commission is not subject to the strict rules of evidence. The commission may (and does) make its own independent survey of the milk industry in the particular area to acquire a just and fair understanding of the problems before it.

(4) The results of any such survey "should be placed on the record of the hearing, and the parties who made it should be subject to such cross-examination as is proper".

(5) "Interested parties should be accorded opportunity to test the reliability of the Commission's evidence before an order is promulgated, revised or changed."

(The Pennsylvania Milk Control Law now requires that a second hearing or conference be held to give those represented at the original hearing an opportunity to criticize the order which the commission proposes to issue.)

(6) Hearings before the commission in relation to price-fixing should be complete.

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[85]Swenson, Rhinehart J. Federal administrative law, p. 64–70. 1952.

[86]*State of New Jersey ex. rel. State Board of Milk Control v. Newark Milk Company*, 118 N. J. Eq. 504; 179 Atl. 116 (1935).

[87]*Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania*, 332 Pa. 15; 1 Atl. (2d) 775 (1938), decided jointly with *Keystone Dairy Co. v. Milk Control Commission*.

In contrast to the foregoing requirements in Pennsylvania, the New Jersey Court of Errors and Appeals held, in the Newark Milk Company case, that a procedure which gave milk producers an opportunity to reflect their sentiments but in no sense resembling a trial "sufficiently satisfied all statutory and other appropriate requirements".[88]

In 1949 an order of the New Jersey Director of Milk Industry was challenged on several grounds, including that of insufficiency of notice of hearing. The contention was that the notice gave interested parties no proposals that they might criticize or support with proof or argument. The Court admitted this to be true, but stated: "...We may assume the Director had no plan in mind when he called the hearing; he looked to the hearing for guidance... The notice did, however, state comprehensively the several subjects on which the Director sought enlightenment. In our opinion, the notice was sufficient."[89]

The contention that the lack of specific proposals in a hearing notice makes it difficult for interested parties to prepare is often met by granting an adjournment after a hearing has been opened and the issues discussed informally for a time. Obviously there are serious disadvantages in limiting a hearing strictly to specific proposals and not permitting consideration of alternative measures.

Use of information not presented at a hearing. The Pennsylvania Milk Control Law requires a hearing to be held before issuance of a regulatory order, but does not specifically state that all order provisions shall be based upon competent evidence produced at the hearing. In October 1942, a hearing was held in Pittsburgh, after which a price-fixing order was issued, establishing a store differential of one-half cent a quart. The market had not been accustomed to a store differential, and the legality of this part of the order was attacked by the milk drivers' union on the ground that evidence on this subject had not been received at the hearing.

The Common Pleas Court of Dauphin County granted the petition of the milk control commission to make more specific findings of fact so as to comply with the requirements of the milk control law as to *Findings*. The Court denied that failure to have evidence on store differentials produced at the hearing voided the order automatically, but said that it might be set aside after a proper proceeding. Later the Court decided that the entire record of the proceedings be remitted to the milk control commission, with directions to revoke the store differential provision.[90]

The question of procedural due process in a milk control hearing also received attention in an Alabama case decided in 1950. Certain price orders of the milk control board reducing prices to producers were

[88]Gellhorn, Walter, Administrative Law, Cases and Comments, (1947, 2d ed.), p. 237.
[89]*In the Matter of Appeal of Port Murray Dairy Company, and Others*, 6 N. J. Super. 285 (1950).
[90]*Harry A. Tenis and Andrew Young, Local Union No. 205, Brotherhood of Teamsters, et al. v. Milk Control Commission*, Court of Common Pleas of Dauphin County, Pa., Commonwealth Docket 1945, No. 18.

declared to be illegal and unreasonable. In so declaring, the Court was especially critical of the board's hearing procedure. Counsel for the board relied on the wording of the act: "The milk control board, in fixing prices, shall be entitled to consider matters within its own knowledge... as well as matters which it has ascertained from other milksheds within the state, and matters ascertained by it, affecting conditions as they relate to milk in other states." The Court, however, concluded that the board's findings of fact were not supported by the evidence produced at the hearing. The board, in certifying a record of its proceedings to the Court, included a part of the *Fluid Milk and Cream Report for March 1950*, issued by the U. S. Department of Agriculture. This, the Court held, had not been submitted at any hearing, and there had been no opportunity to cross-examine. The petitioners, therefore, had been "denied due process with respect to matters...not brought out in open at the hearings so that those whose rights and property will be vitally affected...may have the time-honored Anglo-Saxon right of cross-examination, confrontation of the witness and...submitting in open hearing opposed evidence."

Apparently the Alabama Court was unwilling to recognize the important differences between quasi-legislative and quasi-judicial proceedings, insisting that the standards more commonly applied to the latter be also applied to the former.

An expert member of a regulatory agency must have difficulty separating that which he already knows from the information presented at a public hearing. This practical difficulty has been recognized in Virginia, where the milk commission bases its determinations upon all evidence in its possession, including that introduced at a hearing on a proposed price order. The United States Supreme Court, in the case of Highland Farms Dairy v. Agnew, concluded that the Virginia Milk Commission might properly follow this procedure.[91]

New Jersey's courts have recognized a similar principle with respect to rule-making in that State. It is unnecessary that an order be based solely on evidence produced at a hearing. The director of the Office of Milk Industry was held to be acting legally when he took official notice of weather conditions not reported in evidence at a hearing. The Court said: "...while there was no proof [offered at the hearing] as to rainfall or the drying up of pastures, or that the seasonal decline in milk production had been accelerated in consequence, the Director could take notice of the weather conditions...and from his own experience could deduce what the effect would be on production".[92] The Courts of New Jersey have held that, while the statute provided that all orders shall include findings of fact, the word *order* is to be construed to mean only the quasi-judicial determinations of the director (e.g., orders applicable only to

[91] *Highland Farms Dairy, Inc. v. Agnew*, 300 U. S. 608 (1937).
[92] Ann. meeting Internatl. Assoc. Milk Control Agencies. Proc. 14, Appendix, p. 14. 1950.

persons named therein). The director is not compelled to limit his findings in quasi-legislative proceedings to facts produced at the hearing.[93]

In federal milk order proceedings, a "recommended decision and order" is prepared and issued after a hearing. Interested persons are then given an opportunity to file exceptions. These steps have not been required in state proceedings. In a Pennsylvania case, the Superior Court commented as follows on this procedural issue: "If opportunity is given by some other means than a tentative report and exceptions, to test judicially the fairness of the hearing, and the character and legal sufficiency of the evidence to support the findings on which the order is based, . . . the party deeming itself aggrieved by the order has no just ground of complaint."[94] It was concluded that such opportunity is available at the hearing where all parties can challenge the testimony introduced and cross-examine the witnesses giving testimony. In addition, provision is made in the milk control laws of all states for appealing to the courts for review of decisions made by the milk control agencies.

Termination of orders. All the milk control laws prescribe in more or less detail the procedure to be followed in promulgating a price-fixing order. On the other hand, only a few of the laws specify how an existing order is to be terminated. It is generally presumed that the termination of an order must be preceded by a public hearing where it is found that the need for the order no longer exists, although some states require the withdrawal of a price-fixing order at the request of producer groups.[95]

In practice the termination of a specific order has been accomplished in several ways. The most common procedure is to issue an order superseding the previous order. In some instances, orders have been terminated automatically by changes in the laws—for example, the discontinuance of authority to fix resale prices in Connecticut and New York. In some instances, the Courts have directed that orders be withdrawn or revised. Only in exceptional cases has a state milk control agency terminated an order without holding a hearing.

A rather unusual court case developed in New Jersey when the director of the Office of Milk Industry terminated the minimum resale price-fixing orders effective December 31, 1948, without holding a hearing. This action was attacked in Court on the grounds that: (1) it recited the wishes of the governor; (2) no hearing was held before the order was issued; and (3) no findings of fact were made.[96]

The Court answered that the director might properly consult with the governor, and that he could be convinced of the correctness of the course taken without surrendering his judgment. Furthermore, the Court said

[93]The New Jersey Courts have held, however, that it is improper for the director to base his decision in a quasi-judicial proceeding on information outside the evidence presented at the hearing. *National Dairy Products Company et al. v. Milk Control Board of New Jersey*, 44 Atl. (2d) 796 (1945).

[94]*Commonwealth of Pennsylvania v. Ziegler Dairy Company*, Superior Court of Pennsylvania, Eastern District, October Term, 1939, No. 287.

[95]See Bulletin 908, p. 27 (Cornell Univ. Agr. Exp. Sta., 1954).

[96]*In the Matter of Appeal of Port Murray Dairy Company*, 6 N. J. Super. 285 (1950).

the statutory provisions requiring hearings were applicable only to the fixing or refixing of prices. A repeal or suspension of prices was not to be considered the same as fixing such prices. A finding of fact was not necessary in the absence of a statutory requirement.

Resale price-fixing was re-established in New Jersey in May 1952 after a public hearing as required by law. In February 1955 an unincorporated association of interstate milk handlers in northern New Jersey obtained a court order which temporarily restrained the Office of Milk Industry from enforcing minimum resale prices with respect to these handlers. The Office of Milk Industry then rescinded its resale price orders for the entire State without a hearing. Later the Appellate Court upheld the right of the Office of Milk Industry to proceed with enforcement but the minimum resale price regulation was not reinstated.

Issues on resale pricing

The provisions of state milk control laws relating to criteria that must be considered in determining the level of prices paid producers have not been challenged in the courts. On the other hand, the standards for fixing wholesale and retail prices, and the consequent effect upon dealers' margins, have been the subject of some important court cases. One such case was carried to the United States Supreme Court.

Provision of adequate margins for milk dealers. During 1933 Hegeman Farms, a wholesale milk dealer, paid producers a price lower than the minimum set by the New York Milk Control Board. The board revoked Hegeman's license but said that the license would be reinstated if a total underpayment of $23,000 were made up. The dealer chose to contest the issue in the courts.[97] He contended that by fixing the prices of milk, the control board was violating the Fourteenth Amendment. He also contended that the margin between the 5 cents a quart which he was required to pay producers and the minimum of 8 cents a quart which he was required to charge for an unadvertised brand of milk was insufficient to cover his costs.

The United States Supreme Court dismissed the contention that price-fixing per se was unconstitutional, citing its decision in the Nebbia case. Careful consideration, however, was given Hegeman's view that the prices fixed did not allow him a sufficient spread to operate at a profit, or to obtain a fair return on a fair value of his properties, less depreciation.

The Court emphasized that Hegeman did not show whether his business was operated with reasonable efficiency, or whether he had earned a fair return before the milk price orders became effective. The omission of these facts was considered more significant, especially since the official records showed that the price-fixing orders had increased the spread over what it was previously.

[97] *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163 (1934).

The Court said that it would not be proper to require that minimum prices be changed whenever a dealer could show that the effect of the prices fixed was to deprive him of a profit. The Court, in this connection, made an often-quoted pronouncement: "The Fourteenth Amendment does not protect a business against the hazards of competition." The Court pointed out further that the fixed price was a minimum and not a maximum price. It seemed obvious that some dealers must be efficient enough to sell at the minimum. The Court said that the difficulties of the dealer who needed more spread must be due to his own inefficiency.

Whose costs should be considered? The question of whose costs to use in determining the amount of spread allowed to retail and wholesale milk dealers when prices are fixed is always a perplexing one. Very few of the milk control laws contain any specific instruction on this matter. The Pennsylvania law is an exception. In Pennsylvania the milk control act, as interpreted by the State Supreme Court, requires that the milk control commission

> ...shall not select the most efficient or the least efficient producers or dealers in the milk districts, or areas under consideration, upon whose figures of investments and costs to conclude what a fair return should be, but it should endeavor to utilize a cross-section representative of the average of the normally efficient producers or dealers in the districts... The producer, as well as the dealer, should receive a price that will not only compensate him for reasonable operating expenses, but permit a fair return on his investment. ...this may be difficult to ascertain, but it is the commission's duty, in the first instance, to work it out.[98]

The Court concluded further, that, in determining the price to producers which will permit a fair return to both producer and dealer, it is not necessary to segregate the various classes of milk and determine a price for each which will insure a fair return on each class of milk. The Court permitted the milk control commission to decide "what elements are proper factors in price-fixing", and announced that it would not interfere with the inclusion or exclusion of material items unless arbitrary or capricious. The courts might, however, decide whether or not proper weight had been given by the commission to the items involved.

Store differentials and quantity discounts. In a very recent case, the Supreme Court of Virginia ruled that the milk control agency of that State was not authorized to fix different prices for the same grade of milk based on the method of distribution. The Court also ruled (in the case of Safeway Stores, Inc. v. Milk Commission of Virginia) that the state milk commission must fix maximum as well as minimum prices.[99]

In conformity with its earlier decision in the case of Lucerne v. Milk Commission (see page 83), the Court held that the act does not "...permit classification [of the milk] according to the method of distribution; i.e., whether by home-delivery or store-delivery. The quality of the milk of a

[98] *Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania*, 332 Pa. 15; 1 Atl. (2d) 775 (1938) decided jointly with *Keystone Dairy Company v. Milk Control Commission.*

[99] *Safeway Stores, Inc. v. Milk Commission of Virginia et al*, Sup. Ct. of Va., decided June 13, 1955.

particular grade or class is not affected merely by reason of the method of delivery, the character of its container, or the quantity involved."

Continuing, the Court expressed its conclusion that:

> When the cost of delivery has been considered with all other items of cost in the fixing of a minimum price, and thereafter the cost of home-delivery is singled out as the basis for an upcharge, the result will be that a single item of cost is given double consideration. A price determined on any one cost factor, in part or whole, or elimination of any one or more factors will result in many different prices. If, however, minimum prices are fixed on the basis of representative reasonable cost of the essential factors, and maximum prices are allowed based on single tems of cost peculiar to some distributors, the provision of the statute will be observed, and both the distributor and the consumer will be protected. A field is provided wherein free enterprise and economical operation may have fair play, and the benefits provided for all interested parties will serve the welfare of the general public.... Where minimum and maximum prices are fixed, the spread between them will allow prices for both store and home delivered milk to find their natural levels. The distributor may, within the prescribed limits, charge the price which will yield him a fair return for his method of service, and, if there be a difference between the prices charged for store and home delivery, the consumer can elect the type of service which he deems most to his advantage. Thus, distributors and consumers may each take advantage of the economic factors which affect them respectively.

The Virginia Court pointed out in this decision that the provisions of some other state milk control laws with respect to fixing retail and wholesale prices are couched in different terms. The Oregon law, for example, specifically authorized the milk control agency to classify milk according to the method of delivery, and provided that the agency might establish differentials in prices between house-to-house sales by dealers and over-the-counter sales by stores for cash. But the Virginia law makes no such provision, and the Supreme Court of Virginia insists that the statute not be interpreted to allow the fixing of different prices for the same grade of milk.

Surprisingly, in the same decision, the Supreme Court of Virginia upheld the right of the milk commission to fix quantity discounts, saying:

> ...the decision directing the commission...to be guided by the cost of production and distribution..., read in conjunction with its authority to fix minimum and maximum wholesale and retail prices, is sufficient to empower it to fix a discount in price for quantity sales. A discount based on quantity is not a price differential based on grade such as is prohibited. The price is the same for the same grade in any quantity involved...and results in no discrimination between distributors or consumers.

Price differential for milk sold in paper containers. At the time when state milk control was introduced in the early 1930's, nearly all milk was distributed to consumers in glass bottles. In many instances, the milk control orders in which minimum retail and wholesale prices were fixed also required that bottle deposits be collected at stores. Soon afterward, paper containers came to be used extensively in some of the regulated markets.

Dealers who were not in position to offer milk in these containers com-

plained that the sale of milk in paper at the minimum prices fixed for milk sold in glass bottles constituted unfair competition. They insisted that higher minimum prices should be fixed for milk sold in nonreturnable paper containers because they were more costly and, if sold without an extra charge, gave the distributor an unfair sales advantage. The milk control agencies in several states agreed with these contentions and fixed higher minimum prices (usually one cent a quart higher) for milk sold in paper containers.

The issue came to a head in New York State in 1936 when a large plant was established in New York City to package and distribute milk exclusively in paper containers, principally to chain food stores. After a hearing held in May 1936, tthe New York State Commissioner of Agriculture and Markets found that a higher charge for milk in paper containers was necessary to equalize costs and sales opportunities for such milk with that sold in glass bottles with a 3-cent deposit. On the basis of that finding, the commissioner issued an official order fixing prices for milk sold in paper containers in the New York metropolitan area one cent a quart higher than for milk sold in glass bottles with a 3-cent deposit charge for each bottle.

The specialized distributor of paper-packaged milk immediately challenged this as an unfair discrimination and sought an injunction.[100] A temporary injunction was granted by the lower court but before the case came to trial, the commissioner's authority for regulating retail and wholesale prices of milk expired. Thereupon the case was dropped without reaching a decision.

In Massachusetts, a price-fixing order issued in 1942 required that an extra charge of one cent a quart be made for milk sold in nonreturnable paper containers. The American Can Company, a leading manufacturer of paper containers for milk, brought suit in the Superior Court for a review of this regulation. The lower court stated that under the act the board could take into account not only the kind or quality of product, but the entire service rendered in making this sale. Thus a higher minimum price could be fixed for milk where a nonreturnable container is furnished, provided it be shown that an extra cost is incurred and that the extra charge for paper has a tendency to promote the objectives of the law. Nevertheless, the board's order was declared invalid on the ground that the required procedure had not been followed in promulgating it. Strangely, the lower court also granted an injunction against the issuance of any similar order in the future, but this was modified by the Appellate Court. The Appellate Court said:

> The dealer who delivers in paper renders a service different than the dealer who delivers in glass. If difference in the quality of the transaction is accompanied by difference in costs, a foundation might be laid for a different price. Circumstances might exist

[100] *Dairy Sealed, Inc. v. Baldwin.*

which justify a price differential and the Board should not be precluded in advance from exercising authority by making a proper and reasonable order.[101]

It appears, however, that no further attempt was made by the milk control agency of Massachusetts to establish a price differential for milk sold in paper containers.

A similar case arose in Virginia when the Lucerne Cream & Butter Co. challenged the authority of the milk commission to require one cent a quart more to be charged for milk sold in paper containers.[102] The commission's order was upheld by the Circuit Court but the State Supreme Court of Appeals declared that the act gave the commission no authority to enforce such a differential.

The highest courts of California and Oregon also have decided that the milk control agencies of those states lacked authority to establish price differentials for milk sold in paper containers.[103] The Supreme Court of Oregon declared that the milk control statute did not authorize an upcharge due to an extra cost for a particular item of expense. It said:

> If the statute is to be construed as authorizing an upcharge based on a single item of cost incurred by only a few, then we would be compelled to hold that any other distributor whose practices involved some other single item of cost greater than the average, could also be subject to an upcharge. In harmony with the views of the California and Virginia courts, we think the indicated legislative intent would be that the item of reasonable cost of packaging in paper or glass is to be considered along with all other items of cost in the fixing of minimum prices for the sale of milk, but if the cost of packaging by one method rather than another is thereafter singled out as the basis for an upcharge, the result would be that a single item of cost is given double consideration... We consider the safer course supported by better reasoning to hold that the statute does not authorize the order fixing a differential upcharge in the price of milk sold in single service containers.

Price differential for unadvertised brands of milk. The original milk control law of New York State contained an unusual provision with respect to the pricing of milk of advertised and unadvertised brands. The law provided that a dealer might sell milk of unadvertised brands to stores in New York City for not more than one cent a quart less than the minimum price fixed by the milk control board. In other words, the law created a differential of one cent a quart between advertised and unadvertised brands of milk, in transactions between milk dealers and stores. The attorney general gave an opinion that stores might legally follow the same practice in selling milk to consumers.

Borden's Farm Products Company, one of the principal distributors of advertised brands of milk in the New York City market, challenged this policy and sought to enjoin the State from enforcing the advertised brand differential.[104] Borden's contended that the 1-cent differential was

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[101] *American Can Company of Mass. v. Milk Control Board*, 316 Mass. 337; 55 N. E. (2d) 453 (1944).
[102] *Lucerne Cream & Butter Co. v. Milk Commission*, 182 Va. 490; 29 S. E. (2d) 397 (1944).
[103] *Challenge Cream and Butter Assoc. v. Parker*, 23 Cal. (2d) 137 (1943); and *Sunshine Dairy v. Peterson, Dir. of Agr. et al.*, 183 Ore. 305; 193 P. (2d) 543 (1948).
[104] *Borden's Farm Products Company v. Ten Eyck*, 297 U. S. 251 (1936).

arbitrary, unreasonably discriminatory, and tended to deprive the company of equal protection of the law. The case ultimately went to the United States Supreme Court, which upheld this provision of the New York law, chiefly on the ground that the advertised brand differential had been customary in the market and was a safeguard against monopoly.

The original New York Milk Control Law limited the privilege of selling unadvertised brands of milk to dealers who were in business at the time the law became effective in 1933. Shortly afterward, Mayflower Farms, Inc. challenged this limitation in a legal action against the commissioner.[105] This case also was carried to the United States Supreme Court, which ruled that the limitation violated the federal Constitution which guarantees equal protection of the law to all persons and firms similarly situated.

Posting of resale prices, and recognized price schedules. The experience of New Jersey, between 1949 and 1953, with resale price-posting resulted in a decision upholding the regulation as "not unreasonable". This regulation (No. F 15, June 24, 1949) required that all licensed dealers post with the Office of Milk Industry on or before the 26th of each month all prices at which they would sell milk during the next month, including all units handled by the licensee. Also, each licensee was required to post a list of all stores purchasing from him. Then, all stores were required to post before the end of each month a list showing the price they would charge during the next month for each unit handled.

The Court was impressed by the stabilizing effect of this regulation. The director could thus help to prevent price panic in the retail market and the use of milk as a loss leader by grocery stores. The legal basis of this regulation was declared to be the director's general powers "to supervise and regulate the industry in every way necessary to prevent unfair, unjust, and destructive or demoralizing practices", and "to establish fair trade practices". Since most state milk control agencies hold general powers, similar interpretation appears possible in other states.[106]

The Massachusetts Milk Control Board was not so fortunate, however, in its attempt to make use of "recognized" minimum price schedules. These schedules were in effect from 1935 to 1943 in all except the most important markets, and from 1943 to March 1947 in all markets. They were not fixed prices, but rather those prices which the board recognized as not in violation of that section of the milk control act which forbids sales at less than the cost of product. These schedules were attacked in court by the Massachusetts Restaurant Association as an attempt of the board to fix wholesale and retail prices without conforming to the complex requirements of the act relative to the fixing of such prices. Late in 1947, a court injunction was granted to restrain the enforcement of recog-

[105] *Mayflower Farms, Inc. v. Ten Eyck*, 297 U. S. 266 (1936).
[106] *In the Matter of Appeal of Port Murray Dairy Co. and Others*, 6 N. J. Super. 285 (1950).

nized price schedules and the board made no further effort to maintain this type of regulation.[107]

Reporting of sales and purchases at cut prices

The unique regulation issued by the New Jersey Office of Milk Industry in 1954, which required licensees to report under oath their sales and purchases of milk at cut prices, was challenged by certain subdealers on the ground that it violated the federal and state constitutional privilege against self-incrimination. In deciding this case, the Appellate Division of the Superior Court of New Jersey said the privilege against self-incrimination contained in the fifth amendment to the Constitution of the United States applies only to the federal government and not to the individual states, and that the New Jersey constitution has no similar provision.[108] The Court further ruled that the New Jersey statute which provides against self-incrimination "...does not protect against disclosure of records required to be kept by law in order that there may be suitable information of transactions which are the appropriate subject of governmental regulation and the enforcement of restrictions validly established".

Another contention of the plaintiffs in this case was that the regulation was capricious and discriminatory because it did not apply to out-of-state corporations. The Court held that the regulation applied to all intrastate dealers alike, and therefore did not involve illegal discrimination. The Court also rejected the plaintiffs' argument that the suspension of their licenses should be terminated because the price-fixing order had been repealed after their violation of the reporting requirement had occurred. On this point, the Court said: "The information required... has a vital bearing on the question whether the price-fixing powers given by the statute should be exercised, and...on the timing of such exercise."

Blending and equalization

Payment of blended returns by dealers. Some serious legal questions arose in Connecticut and Pennsylvania out of the efforts of producer-dealers to avoid including their own production in computing the blended prices paid other producers. The Connecticut law specifically authorizes the milk control agency to require producer-dealers to include their own production in computing such prices. Nevertheless, a group of producer-dealers buying milk from other producers brought action to enjoin enforcement of this provision of the Connecticut statute. The Court upheld the statute, saying:[109]

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[107] *Massachusetts Restaurant Association v. Roger F. Clapp* (1947), and *David L. Goss v. Roger F. Clapp* (1948).

[108] *Bianchi et al. v. Hoffman*, Superior Court of New Jersey, Appellate Division, No. A130-54. Decided July 25, 1955.

[109] *Connecticut League of Dairy Farmers and Producer-Dealers v. Donald O. Hammerberg, Milk Administrator*, Superior Court of Hartford County, Connecticut, 1942.

It is the Court's opinion [that] the end, object and effect of the legislation is the stabilization of price so that the inevitable incidence of surplus milk is a problem common to all producers alike. These plaintiffs are not being deprived of property without due process of law. They are required to share with other producers the vicissitudes of a calling common to a group for the mutual welfare of its members and the interest of the public. The dual role which they have voluntarily assumed, makes them more vividly conscious perhaps of the working-out of the benign principle of sharing one another's burdens, but the net result is the same.

The Pennsylvania Milk Control Law makes no mention of producer-dealers, but does specify that *dealers* pay a blended price for all milk *received* from producers. Under the wording of the Pennsylvania statute (and orders), it was necessary to find that the dealer had "received" his own production. In the case of Wesley Grow v. Commission, the dealer contended that he could not "receive" the milk produced on his own farm since he already owned it.[110] Nevertheless, the Court held that the dealer had "received" his own production, and must, as a producer, share his Class I and Class II sales ratably with the farmers from whom he was purchasing milk.

In a similar Pennsylvania case, the Common Pleas Court of Northampton County stated the principle apparently intended by the legislature of that State as follows: "The intent of the act and of the commission's general order require that no producer...should have extended any special privileges or immunities not enjoyd by all, for otherwise the statute and order offend constitutional requirements of uniformity of operation, or constitutional prohibitions against special privileges and immunities." The order of the commission made certain that all producers, including producer-distributors, were treated with equal fairness. When a distributor is also a producer, he is not entitled to stand differently from other producers with respect to the classification of the milk which he produces.[111]

Marketwide equalization. The question of the legality of marketwide equalization has been raised in several of the states having milk control laws. The first such case arose in Connecticut in 1934, where an attempt had been made by the Connecticut Milk Control Board to carry out a plan of equalization payments. An injunction was sought to prevent the board from revoking a dealer's license for refusing to make payments to an equalization fund. The decision of the Superior Court of Hartford County held that there was no specific or implied grant of power in the act to support the equalization program. Thereupon, the board suspended the plan and refunded the equalization funds then in its possession.[112] When the law was revised in 1941, specific provision was made for dealer

[110] *Wesley Grow v. Commission*, Common Pleas Court, Montgomery County, 52 D and C (Penn.) 225.

[111] *John F. Rau trading as Rau's Dairy v. Milk Control Commission*, Court of Common Pleas of Northampton County, Pa., No. 24, June Term, 1944.

[112] *Morton E. Pierpont v. Board of Milk Control* and *Milk Producers-Dealers Association v. Board of Milk Control*, decided March 2, 1934.

pools but not for marketwide equalization.

A New York Supreme Court case involved the legality of the equalization provision in the state milk control order for the Niagara Frontier. In 1939, shortly after the order became effective, 4 dealers who had a high Class I utilization refused to make the required equalization payments, on the grounds that this requirement was unconstitutional. The Commissioner of Agriculture and Markets filed a complaint against the dealers, requesting an injunction to force them to comply with the order. Justice Bergan, of the Supreme Court of Albany County, dismissed the commissioner's motion for an injunction. In doing so, he stated that while the statute authorized the commissioner to effectuate an equalization plan subject to producer approval, it contained no express declaration by the legislature that equalization of prices had anything to do with protecting the dairy industry in the interest of the public. Furthermore, as he interpreted the law, it did not require a public hearing on the question of equalization. Therefore, he concluded, the provision for equalizing prices was an unconstitutional delegation of legislative power.

The fact that 75 per cent of the producers must assent to equalization was, in Justice Bergan's opinion, as much of an invalid delegation as one to an administrative officer. It was a violation of due process of law, he believed, for property to be taken from one and given to another by an administrative officer, or by the vote of a majority of the members of an industry.

After this decision, the act was amended so as to set forth the reasoning back of equalization and to provide for findings to be made by the commissioner determining whether the equalization of prices to producers was reasonable and necessary. Just before the effective date of this amendment, however, the New York Court of Appeals reversed the Bergan decision and upheld marketwide equalization under the New York law.[113] In the same year (1939), the United States Supreme Court sustained the equalization provision of the federal order for the New York metropolitan milk marketing area.[114]

The provision in the New York law granting the Commissioner of Agriculture and Markets the authority to require producer-dealers to participate in marketwide pools was upheld by the New York Court of Appeals in 1943.[115] The Oregon Milk Control Act of 1933 provided for a system of marketwide pooling, but exempted producer-distributors. This exemption was declared to be an unlawful discrimination and consequently invalid.[116] Several of the federal marketing orders exempt producer-distributors from marketwide equalization. To the knowledge of the authors, the legality of these exemptions under federal milk orders has not been tested in the courts.

[113]*Noyes v. Erie and Wyoming Farmers' Cooperative Corporation*, 281 N. Y. 187 (1939).
[114]*United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533 (1939).
[115]In the matter of *Morgan v. Noyes*, 290 N. Y. 737 (1943).
[116]*Meyer et al. v. Oregon Milk Control Board and Brandes Creamery,*

The equalization requirements of state milk control orders for the Niagara Frontier and Rochester markets and of the federal order for the New York City market were contested by the New York State Guernsey Breeders' Cooperative Association in a lengthy series of court actions in both state and federal courts. The Guernsey Breeders insisted that their milk possessed characteristics which distinguished it from other milk and justified either a preferential classification or a special differential paid from the equalization funds.

It was agreed that because of the deep yellow color and other characteristics of Guernsey milk, dealers normally gave preference to it for bottling and seldom used it in the lower-priced classifications for the manufacture of milk products. The counter argument was that the qualities which caused dealers and consumers to prefer Guernsey milk should enable the Guernsey Breeders to obtain a premium over the minimum price specified by the milk control orders, and that other producers should not be required to contribute to a special quality differential paid from pool funds. Another contention of the Guernsey Association was that the cost of producing Guernsey milk was greater than the cost of producing ordinary milk.

The federal court action on the Guernsey issue was concluded in 1944 with a decision by a United States Circuit Court of Appeals upholding the equalization provision of the New York order.[117] The contest in New York State courts, however, extended over a period of 14 years. During that time, to satisfy court requirements, the Commissioner of Agriculture and Markets conducted unusually extensive hearings on the issue and published detailed findings. Finally the commissioner's decision that Guernsey milk must be included in the equalization accounting on the same basis as other milk was upheld unanimously by the New York State Court of Appeals.[118]

In Pennsylvania, marketwide equalization has never been practiced. However, there appears to have been some interest in the matter, since the attorney general of that State was asked to express an opinion as to whether marketwide equalization was legal under the Pennsylvania statute. He held that marketwide equalization is legal in Pennsylvania, even though it is not specifically authorized by the law. This opinion states, however, that the milk control act does not authorize the commission to make deductions to cover the cost of operating marketwide pools. Moreover, current fiscal policies in Pennsylvania would require that payments by dealers into a pool be transferred by the milk control commission to the state treasury, and then paid by the treasury to the producers shown to be entitled to the funds. This requirement would

[117] *New York State Guernsey Breeders' Coop., v. Wickard,* 141 F. (2d) 805 (C. A. 2); 323 U. S. 725 (1944).

[118] *New York State Guernsey Breeders' Cooperative, Inc. v. DuMond,* 304 N. Y. 906. Confirming the Appellate Division order in 279 Appellate Division 683 (1953).

have to be altered if marketwide equalization were to be practiced in Pennsylvania.

Cooperative payments. New York is the only state that has made provision in its milk control law for payments to cooperatives out of marketwide pool funds. The milk control orders for the Niagara Frontier and Rochester markets, as well as the complementary state order for the New York City market, require that such payments be made to compensate for services that are presumed to benefit all producers. The legality of the cooperative payment provisions of these orders have not been challenged, but some very important litigation has developed with respect to similar provisions of the federal orders for Boston and New York.

In the case of Stark v. Brannan, the United States District Court for the District of Columbia held that the Federal Marketing Agreement Act made no provision for the Secretary of Agriculture to deduct moneys from a pool to be paid to cooperative associations.[119] Three years later the case was decided on similar grounds by the United States Supreme Court, with 3 of the 7 participating justices dissenting.[120] The majority turned aside the government's contention that the payments to cooperative associations, as provided for in the Boston order, were essential to effectuate the equalization of returns to all producers, which is specifically authorized by the act. The dissenting opinion was particularly strong in support of the principle of cooperative payments.

After the Supreme Court decision in the Stark case, the solicitor of the United States Department of Agriculture gave an opinion that the validity of the cooperative payment provision of the federal order for the New York City market (which differed from that in the Boston order) was not affected. Almost immediately, however, the New York payments were challenged in an action that was brought in the names of several producers who were not members of qualified cooperatives. This case was decided in favor of the government in the United States District Court for the District of Columbia, but it has been appealed to the United States Circuit Court of Appeals.[121]

Before the case of Grant v. Benson was tried in the United States District Court, the whole question of cooperative services under a federal milk order and payments that should be made for those services was studied by a committee of milk marketing economists appointed for that purpose by the United States Department of Agriculture and the New York State Department of Agriculture and Markets. This committee concluded that producer-cooperatives should be encouraged to render marketwide services in support of the New York milk order. Finding that all producers benefit from certain cooperative activities, called *order activi-*

[119] *Stark et al v. Brannan*, 82 F. Supp. 614 (1949); Affd. Court of Appeals of the District of Columbia, 87 U. S. App. D. C. 388; 185 F. (2d) 871. (1950).
[120] *Brannan v. Stark*, 342 U. S. 451 (1952).
[121] *Grant et al v. Benson et al*, No. 12,478 U. S. Court of Appeals for the District of Columbia (1955).

ties and education, the committee concluded that payments from the pool should be made for the performance of services that contribute significantly to the functioning of the order. These include: (1) analysis of marketing problems that relate to the order; (2) proposing amendments affecting prices and other terms of the order; (3) preparing and presenting testimony at hearings on order amendments and on rules and regulations; and (4) keeping producers well informed. The committee said also that cooperatives which operate marketing facilities are likely to have closer contact with their members and more intimate knowledge of market conditions; other things being equal, operating cooperatives are likely to be more effective in "order activities and education" than nonoperating cooperatives. In December 1953, the New York order was amended to embody most of the recommendations of this committee.

Restrictive licensing

As stated previously, restrictive licensing of milk dealers has been practiced generally in New York State and to a limited extent in Virginia. Outside the Northeast, Georgia and Oregon have attempted to limit competition in the handling and distribution of milk by denying applications for licenses on the ground that the markets were already adequately served.

The case of Dusinberre and Oaks v. Noyes arose out of the refusal of the New York State Commissioner of Agriculture and Markets to grant a license to a newly formed partnership for the purpose of establishing a distribution business in Geneva, a city of about 15,000 population, served by only two licensed dealers.[122] The commissioner found, after a hearing, that the market was already adequately served, that issuance of the license would tend to destructive competition and was not in the public interest. The application for a license was denied. The New York Court of Appeals held the statute constitutional and determined that since there was substantial evidence to support the commissioner's decision, the Court would not substitute its judgment for that of the commissioner.

A similar issue arose in the New York City metropolitan area where a dealer sought to extend the area in which he was distributing milk. The dealer offered evidence to show that he had lost business during the period 1937–1940 and therefore wished to extend his operations into a new area. The New York Court of Appeals confirmed without opinion a decision of the Appellate Division of the State Supreme Court which upheld the commissioner's denial of the application.[123]

In 1953, the Appellate Division of the New York Supreme Court upheld the right of the commissioner to refuse to extend the license of a dealer so that he might distribute milk in a village that was then served by only

[122] *Dusinberre and Oaks v. Noyes,* 284 N. Y. 304 (1940).
[123] *In the Matter of Dellwood Dairy Co., Inc. v. Noyes,* 263 Appellate Division 923; 288 N. Y. 715 (1942).

one distributor. In its opinion on this case, the Court said:[124]

> There is nothing in the statute indicating the condemnation of monopolies of milk distribution in particular areas. When the Legislature places any business under regulation, with the requirement of a license for entry into the business, it necessarily contemplates the possibility of a monopoly in those areas in which a single license is granted. In many situations, under a regulatory statute, a monopoly may well be found to be in the public interest. Governmental regulation is then relied upon to provide the safeguards of the public interest which competition is expected to provide under the free enterprise system.

In 1949, the New York Court of Appeals approved of the commissioner's action in refusing to extend the license of a New York City dealer so that he might operate a milk receiving plant at a new location.[125] The commissioner had denied the application on the ground that the proposed plant would tend to cause destructive competition in a market already adequately served, and would not be in the public interest.

The United States Supreme Court had just handed down a decision in the Hood case (see below) denying the right of the New York Commissioner of Agriculture and Markets to prohibit an out-of-state dealer from constructing a new plant within the State. Grandview Dairy argued that the commissioner should likewise be restrained from denying an intrastate dealer such permission. However, the New York Court of Appeals decided unanimously in favor of the commissioner, permitting him to deny the license for the causes stated. Thus, the basic power of the commissioner to regulate the establishment of such facilities through licensing was confirmed.

But while the legality of restrictive licensing of local or intrastate dealers has been fully cleared in the New York State courts, the practice as applied to dealers engaged in interstate commerce has been condemned by the Supreme Court of the United States. H. P. Hood & Sons, Inc., a New England milk dealer, sought to establish an additional milk receiving plant in eastern New York. After a hearing on Hood's application, the Commissioner of Agriculture and Markets found no evidence of need for additional facilities to handle milk in the area. It was concluded that issuance of a license would tend toward destructive competition in a market already adequately served and would not be in the public interest. The commissioner found that the plant would divert milk from other buyers, some of whom were serving the Troy, New York, market, and that at times the Troy market had been inadequately supplied. Thus, the application was denied.

In a 5-to-4 decision, the United States Supreme Court ruled that the commisioner's refusal to grant a license violated the federal constitution.[126] This sort of state restriction was regarded by the majority of the court to be clearly for the purpose of curtailing interstate commerce to

[124] *In the Matter of Williams v. DuMond*, 282 App. Div. 76; 121 N. Y. Supp. (2d) 830 (1953).
[125] *In the Matter of Grandview Dairy, Inc. v. DuMond*, 299 N. Y. 695 (1949).
[126] *H. P. Hood & Sons, Inc. v. DuMond, Commissioner*, 336 U. S. 525 (1949).

aid local economic interests. Thus the commissioner's order was held to be a violation of the commerce clause of the United States Constitution.

A Virginia case involved only the question as to whether the commission had sufficient grounds for denying a particular application for a license, and did not involve an attack upon the authority for restrictive licensing under the Virginia Milk and Cream Act.[127]

The Virginia Milk Commission provided in its regulations that a license for a new distributor or for the extension of an existing business would be granted only: (1) if an applicant were qualified by character and experience, financial standing, and equipment; (2) if the new facility would not tend to destructive competition; and (3) if the additional facility was in the public interest.

Rountree Dairy, a producer-distributor, was denied a license to operate in the Suffolk market. The Supreme Court of Appeals (highest court in Virginia) ruled that the decision of the commission was arbitrary and capricious and not sustained by the evidence. The Court's decision did not question the power of the commission to refuse a license when the applicant actually failed to fulfill the specified requirements.

A major legal battle over restrictive licensing also has occurred in Oregon. The chief litigant has been Safeway Stores, Inc., a leading food chain organization that has been an aggressive merchandiser of milk. A case decided by the Circuit Court for Multnomah County involved a question of extending Safeway's license to permit them to distribute milk in a new area.

Citing Dusinberre and Oaks v. Noyes (the New York precedent), the Court held that the administrator had not exceeded his authority. When this case was argued before the Oregon State Supreme Court, counsel for the administrator contended that, since two corporations already were engaged in processing and distributing milk in Salem, the Salem area was adequately served, and that Safeway, therefore, should not be licensed to sell in Salem milk that had been processed in its Portland plant. By a 3-to-2 decision, the Oregon Supreme Court reversed the Multnomah County Circuit Court, thus giving Safeway freedom to sell milk in Salem. The opinion opposed "conferring a monopolistic advantage upon each already-licensed dealer, or the doctrine of controlled economy".[128]

This decision was a direct reversal of a decision made by the Oregon Supreme Court in 1947.[129] In that case, the Director of Agriculture, who was ex-officio administrator of the Oregon Milk Control Law at that time, denied a dealer in Wilhelmina authority to distribute milk in the adjoining Sheridan market on grounds that the market was adequately served.

[127] *Rountree v. Milk Commission*, 184 Va. 777 (1946).
[128] *Safeway Stores, Inc. v. Ohlsen, Milk Marketing Administrator*, 192 Or. 1; 233 Pac. (2d) 273 (1951).
[129] *State ex rel. Peterson v. Martin*, 180 Or. 459; 176 Pac. (2d) 636 (1947) (See Proceedings of Eleventh Annual Meeting of International Association of Milk Control Agencies, 1947, pp. 82–84.)

The Court upheld this action, even though the milk control act contained no specific legislative authorization to refuse a license on such grounds.

Bonding of milk dealers

This function which usually is performed by an agency other than the milk control agency, is included among the activities of the Pennsylvania Milk Control Commission. Several decisions by the courts of that State clarify the rather technical issues raised. Some principles indicated by the decisions are:

1. While a dealer's bond protects a producer whose milk is sold outside the State, it does not protect producers living in Maryland or presumably in other states. Each state protects its own producers.
2. The enactment of a new milk control law repealing the earlier acts did not affect a dealer's bond. All licenses, permits, rules, regulations, and orders made under the earlier legislation continued in effect under the new law.[130]

The New York milk dealer bonding law was held constitutional in the cases of People v. Beakes Dairy Co., and People v. Perretta.[131] Other decisions have determined that the bond legally protects producers only, that the fact that many producers do not wish to have the protection afforded by a bond is immaterial, and that the right of the commissioner to require bond is unquestionable.[132]

Control of evasive practices

Great ingenuity has been demonstrated by persons seeking to avoid the force and effect of milk control laws. For example, in Pennsylvania, a milk dealer discontinued "buying" milk in the usual way and offered to accept it "on consignment". Attorneys for the commission argued that the dealer must pay the minimum prices fixed by the board's orders. The Court, however, ruled that the milk control law did not apply in such cases, and said that "power given to extra-judicial tribunals should be strictly construed".[133] This decision opened a serious break in the system of regulation, which was promptly closed by amending the law to make clear that the minimum prices fixed by milk control orders apply even where consignment contracts are used.

A type of difficulty that is frequently encountered in the enforcement of minimum resale prices was the basis of an action brought by a Pennsylvania milk dealer against the milk control commission of that State. It came to the attention of the commission that Sylvan Seal Milk, Inc. of Philadelphia was providing refrigerated display cabinets without charge to stores selling Sylvan Seal products. A majority of the commission concluded that this special free service was equivalent to selling for less than

[130]Warner, Earl, and Pierce, C. W. Court decisions relating to Pennsylvania milk control. Penn. State Coll. School of Agr. Prog. Rept. 78. May 1952.
[131]*People v. Beakes Dairy Co.*, 179 App. Div. 942, Affd. 222 N. Y. 416 (1918); and *People v. Perretta*, 253 N. Y. 305 (1930).
[132]*Wilson v. Israel*, 227 N. Y. 423 (1920); and *Ten Eyck v. Eastern Farm Products*, 249 Appellate Division, N. Y. 891 (1937).
[133]*Green v. Milk Control Commission*, 340 Pa. 1; 16 Atl. (2d) 9 (1940).

the fixed minimum prices. A dissenting member of the commission argued that the practice did not constitute a violation of the board's minimum price order since stores using the cabinets were required to furnish valuable space and were restricted to using the cabinets only for Sylvan Seal products.

The milk commission moved to revoke Sylvan Seal's license, but the Court to whom the company appealed for protection held that the furnishing of free cabinets did not constitute a violation of the commission's price-fixing order.[134] In reversing the decision of the majority of the commission, the Court gave some attention to the point of view taken by the minority member, but appeared more interested in exposing the dangers to "the fabric of our democratic conception of human and individual rights" arising from the exercise of such powers as those granted the commission by the Pennsylvania Milk Control Act. This decision was never appealed to higher courts.

Regulation of delivery service

The practice of delivering milk to consumers on an every-other-day schedule, which had developed on a voluntary basis in a number of places before 1942, was made compulsory during World War II by order of the federal Office of Defense Transportation. Special deliveries and call-backs for collection or other purposes also were forbidden, to conserve gasoline, tires, and trucks. Shortly after the end of hostilities, this federal order was revoked, but certain of the state milk control agencies attempted to enforce similar regulations.

Two cases arose in Rhode Island and New Hampshire during the war as a result of orders by certain milk control boards which prohibited any special deliveries or call-backs, or deliveries of milk to any retail customer more often than every other day.

In Rhode Island, the Superior Court, in the case of George H. Comstock v. Milk Control Board, concluded that the milk control law gave the board power to provide full and reasonable regulation of the milk industry; that the order was adopted as a part of the national government's effort to save gasoline and tires, was reasonably adapted to that end; and was, therefore, a reasonable and valid regulation.[135]

In New Hampshire, the Court gave only limited approval to a milk control order restricting delivery service. The dealer in question had, before issuance of the order, acquired horse-drawn vehicles, some being equipped with rubber tires and some with steel tires. The Court, in the case of Cloutier v. State Milk Control Board, ordered the regulation suspended on all vehicles other than motor vehicles or rubber-tired vehicles.[136]

[134] *Sylvan Seal Milk v. Milk Control Commission*, Common Pleas No. 2, June 1950, No. 927, Philadelphia, Pa., January 29, 1951.
[135] *George H. Comstock v. Milk Control Board*, Rhode Island Superior Court, October 2, 1942.
[136] *Cloutier v. (N. H.) State Milk Control Board*, 92 N. H. 199; 28 Atl. (2d) 554 (1942).

Shortly after the war (1945), an interesting case involving an every-other-day delivery order arose in Alabama. In this case, the E.O.D. order was questioned with special vigor because of certain terminology of the Alabama Milk Control Act, which declares "that fluid milk is a perishable commodity, easily contaminated...which cannot be stored for any great length of time, and which must be produced and distributed fresh daily..." The Alabama Supreme Court answered the more important questions by the following expressions of opinion, thus confirming the order:[137]

1. The every-other-day order does not prohibit, but on the contrary, contemplates daily production and delivery of milk.
2. There is nothing to show that the provisions of the order requiring the delivery of a 2-day supply (even though this makes the customer the storer of the 2-day supply) has resulted in any harmful effects.
3. The saving in cost which this plan of delivery will produce seems obvious.

The Pennsylvania Milk Control Commission did not issue every-other-day delivery regulations until the O.D.T. order was withdrawn. Under the Pennsylvania Milk Control Law, violation of the every-other-day delivery order was made a misdemeanor. An accused violator was found guilty and subjected to a $25 fine. The commission looked upon the E.O.D. order as a proper device for attaining certain objectives of the milk control law. The law in its preamble states that public health is menaced "when consumers are required to pay excessive prices" for milk. A later section empowers the commission "to supervise...and regulate the entire milk industry...including the transportation, distribution, delivery, handling...and sale of milk."

The Superior Court of Pennsylvania was not willing to concede such large powers to the commission.[138] They were impressed by the dealer's claim that he was losing business because other dealers were supplying his customers on the alternate days between his deliveries. The Court concluded that costs of distribution would be reduced only if the law were to prohibit the receipt of deliveries by customers more often than once every other day.

It is evident that the court decisions in cases relating to the regulation of delivery service by milk dealers are conflicting and inconclusive. Possibly the courts would give stronger support to the exercise of such authority by the milk control agencies if more specific provision for it were made in the laws. The matter has not been pressed either in the courts or in the legislatures because milk dealers have continued the system of every-other-day delivery almost universally on a voluntary basis.

Court review of milk control orders

As stated earlier in this report, under New Jersey law the courts have

[137] *Alabama State Milk Control Board et al. v. Graham*, 250 Ala. 49 (1947).
[138] *Milk Control Commission v. William Hollinger*, Pennsylvania Superior Court, Memorandum Decision No. 37, December 12, 1951.

much responsibility for decisions on milk prices and other aspects of milk control. An aggrieved person may, within 10 days after a milk control order is issued, appeal for relief to the Appellate Division of the Superior Court. The filing of such an appeal acts as a stay (supersedeas) of the order, unless otherwise determined by the Court. In such cases, the Office of Milk Industry is required to transmit to the Court a copy of the hearing record and findings of fact on which its decision was based. Any interested party may apply to the Court for permission to present additional evidence. If the Court is satisfied that the additional evidence is material it may order that evidence to be taken before the director, who may then modify his findings by reason of the additional evidence and file a new rule or order with the Court. The Court may affirm, suspend, reverse, vacate, or modify the order as being: (1) contrary to constitutional rights and privileges; (2) in excess of statutory authority; (3) promulgated upon unlawful procedure; (4) unsupported by substantial evidence; (5) affected by error of law; or (6) arbitrary or capricious.

It appears to the authors of this report that such procedure involves unnecessary delays and imposes upon the courts the responsibility for decisions which the milk control officials with their intimate knowledge of the industry are, as a rule, better qualified to make. In general, the courts of states other than New Jersey have taken the position that they should not interfere with the decisions of the milk control officials, provided that those decisions are in accordance with the law and that there is no evidence that the agency has acted arbitrarily or capriciously.

The Supreme Court of Pennsylvania made some very significant comments on this point in the Colteryahn and Keystone cases in 1938.[139] The Court found that the plaintiffs had not submitted to the commission all the evidence that was available, and said it was the duty of the lower court to decline to receive such additional evidence. The only evidence the Court should have heard on appeal was (1) evidence not available to present to the commission at the time of the hearing, or (2) evidence to clarify the record or to show the actual effect of the order appealed from, which could be provided only after promulgation of the order. Chief Justice Kephart, who wrote the opinion warned that, if the lower court persisted in the course of procedure followed in these two appeals, the usefulness of the milk control commission would be at an end and the Dauphin County Court would "become the price-fixing body of the milk industry."

Statistical and Information Service

None of the milk control laws of the northeastern states mentions the collection and analysis of data on milk dealers' operations or the publication of reports based on such data as a function of the milk control agency.

[139] *Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania*, 332 Pa. 15; 1 Atl. (2d) 775 (1938). This case was decided jointly with *Keystone Dairy Co. v. Milk Control Commission of Pennsylvania*.

Nevertheless this is an important type of service. The laws do authorize the milk control agencies to require all licensed dealers to keep records of their operations and to file reports. Such records and reports obviously are needed as a basis for checking the accuracy of the dealers' classification of milk and their payments to producers. They also serve as the basis of statistical information that is highly useful to the milk control agencies, to the milk industry, and to persons engaged in economic research, teaching and extension activities relating to milk.

Foremost among the statistical data compiled by state milk control agencies are tabulations of monthly quantities of milk received by dealers and plants, and the quantities and percentages of milk disposed of in the different classes prescribed by milk control orders. In some instances the data are given separately for different marketing areas. Other kinds of data commonly published by the milk control agencies include monthly averages of butterfat tests, minimum class prices, blended or uniform prices, and market quotations (for butter, nonfat dry milk, and the like), which are used in formulas for computing the minimum prices of surplus milk.

There is a great deal of variation in frequency, kind, and details of statistical reports issued by the different milk control agencies. Some do little more than to give a brief statistical summary of milk receipts and utilization in their annual reports. Others issue regular monthly reports and extensive annual summaries. In New England, the Connecticut Milk Administration probably has given most attention to the preparation of statistical reports for general use. The 2-page *Market Administrator's Bulletin*, issued about the 5th of each month, shows the number of dealers and total quarts of fluid milk sold in each of 14 marketing areas during the second preceding month. It also shows the dealers' total receipts of milk from Connecticut farms and from out of state; also the quantities from each source that were sold for fluid use, the minimum class prices and butterfat differentials, and the state average of blended prices paid producers. In addition, a special statistical report is prepared for presentation at each public hearing that is called to consider a change in prices. In the summer of 1950, a statistical summary for the period 1938–1950 was published under the title *Compilation of Statistical Series Pertaining to the Dairy Industry in Connecticut.*

The milk control agency of Rhode Island issues an annual volume entitled *Rhode Island Dairy Industry Statistics,* in addition to its annual report which also contains much factual data.

New York State undoubtedly has a more elaborate system of statistical records and reports, with respect to the supply, uses, and prices of milk, than any other state in the Northeast. This is due in part to the fact that New York is the most important dairy state of the region. Among the 48 states of the nation, it ranks second only to Wisconsin in total milk production. The high development of dairy statistics in New York State also

must be credited in part to the exceptional interest and ability of a few individuals who have had the chief responsibility for this work in the State Department of Agriculture during the past 30 years, and to the encouragement and support they have received from the milk industry of the State.

The New York State Division of Milk Control has no statistical section of its own, but this division works very closely with the Bureau of Statistics, which is in the same Department of Agriculture and Markets. Three statistical clerks employed by the Division of Milk Control work in the Bureau of Statistics under a specialist who has had many years of training and experience in compiling statistics relating to the dairy industry.

The monthly reports received by the division from licensed dealers are turned over to the Bureau of Statistics for tabulation. Each of these reports gives a monthly summary of the receipts and utilization of milk, cream, and skimmilk, the data being reported separately for each receiving plant. Also shown in the dealer's monthly report are the number of producers who delivered the milk, butterfat tests, plant inventories, and the prices and amounts paid farmers for milk and cream.

These monthly reports of dealers provide the principal basis for an annual volume entitled *Statistics Relative to the Dairy Industry in New York State*. Somewhat similar annual summaries of dairy statistics were published by the Department of Agriculture and Markets for many years before the state milk control law was enacted. The data formerly were obtained from dealers and plants on a voluntary basis. The reports now required under authority of the milk control law give a more complete coverage of the milk industry in the State. Somewhat more detailed information also is obtained, especially with respect to the disposal of milk, cream, and skimmilk by dairy plants, and sales of fluid milk and cream in different marketing areas.

The New York statistical summary for 1953 is a mimeographed publication of 126 pages, of which only the first 15 are occupied by introductory text and a table of contents. The remaining 111 pages consist entirely of statistical tables and explanatory footnotes. The scope of the report is indicated generally by the following sectional headings:

1. Number, size and nature of operation of dairy plants (plants are grouped by location, by kinds of products made, by cooperative or proprietary status, and by volume of milk received).
2. Farmers and their milk and cream deliveries to plants (data are given by counties, by months, and by type of plant).
3. Prices, premiums, and payments to farmers for milk and cream delivered.
4. Butterfat test of milk received from farmers (by counties, and by months).
5. Milk shipped or sold for fluid use and fluid milk and cream consumption (included is a record of per capita consumption of fluid milk and fluid cream in New York State, 1940–1953, and quantities of milk sold for fluid use in selected upstate marketing areas).

6. Milk equivalent of cream shipped or sold for fluid use.
7. Milk, cream and skimmilk used in manufacture at dairy plants.
8. Summaries of receipts and disposal of milk and cream (included is a comparison of the percentage of the milk received from farmers' and dealers' own herds that was used as fluid milk and cream in 15 marketing areas. Utilization data are given for various counties and districts).
9. Dairy products manufactured (by counties, and by months, also by plants of different types).
10. Frozen dessert statistics (based on data obtained by the department under the frozen desserts law).
11. Dairy farm and crop reporter data (compiled in connection with the federal-state crop and livestock reporting service).
12. Selected market order statistics (see following comment in text).
13. Retail prices for milk and cream in New York State cities.

In many instances, data for a series of years are given in this annual statistical publication in addition to the details for the latest year.

As previously stated, producer price-fixing orders are in effect for the three largest markets of the State. The market administrator's office in each of these areas prepares and issues a 1- or 2-page monthly report showing the total receipts of milk, the quantities and percentages used in the several prescribed classes, the minimum class prices and butterfat differentials, the applicable adjustments and deductions and the uniform price to be paid by dealers or handlers. Certain other market information, such as the market quotations for butter and skim powder, and the mid-west condensery price also are given.

The market administrator of the New York City market also issues a printed monthly bulletin to supply news and data covering the operation of the concurrent federal and state orders. Annual statistical summaries giving much detailed information for the current year and previous years are issued for all three markets. Some of the contents of these market summaries are reproduced in the annual *Statistics Relative to the Dairy Industry in New York State,* previously described.

The New York Dairy Farm Report, issued monthly by the federal–state crop-reporting service with which the bureau of statistics is associated, carries a monthly record of the total receipts of milk from farmers at dairy plants, and at least once a year gives a summary of dairy products manufactured in New York State dairy plants. The division of milk control issues a monthly *Milk Price Report,* which carries information on retail prices of milk and cream.

The New Jersey Office of Milk Industry issues a monthly statistical report consisting of two tables. One of these shows the quantity of milk purchased by dealers from Grade A and Grade B producers in northern and southern New Jersey, the quantities used in each class, and the amounts paid producers. It shows also the output of producer-dealers and dealers' own herds. The second table shows the quantities of different grades and types of milk and the milk equivalent of cream sold in north-

ern and southern New Jersey during the latest month, and comparable figures for the corresponding month of several previous years. These monthly data are reproduced in annual summaries. Unfortunately no data for out-of-state plants that supply large quantities of milk to New Jersey markets are given in the monthly or annual reports.

The Pennsylvania Milk Control Commission issues two statistical summaries each year based on data from dealers' monthly reports. One of these is entitled *Receipts, Utilization, and Payments to Pennsylvania Producers.* Monthly data are given with respect to plant receipts of milk, average butterfat tests, quantities of milk used in the several classes, and the amounts paid producers. These data are given for the entire State, for several different kinds of plants, and for different counties and regions.

Another report issued by the Pennsylvania Milk Control Commission each year provides a summary of financial data for the milk dealers of the State. It shows, among other things, the amount of net sales (in dollars) for all dealers and for "processing milk dealers" in each of the 15 milk control areas of the State. Financial summaries are given also for 7 different groups of "processing milk dealers" arranged according to quantity of milk handled during the year. The summary for each group of dealers shows the amount of net sales, the operating profit before and after taxes on income, and the profits expressed as percentages of net sales. Shown also is the number of dealers in each group that had specified rates of profit or loss. Other sections of this report give summaries of assets and liabilities of "processing milk dealers" and of their income, expenses, taxes on income, and profits. The income, expense, and profit data are given for dealers in each of the 15 milk control areas of the State.

A rather elaborate statistical report for each milk control area in Pennsylvania is prepared whenever a public hearing is to be held on possible changes in minimum prices. This report includes detailed information on a monthly basis concerning the net sales, product cost, and operating expenses of milk dealers in the area; dealers' purchases of milk from producers and other plants; hauling charges; and sales of different types or grades of fluid milk and cream, with average butterfat tests. Monthly figures are given for several years, but there is doubt as to the comparability of the data from year to year, because the reports for some dealers were incomplete or not available for tabulation at the time the summaries were prepared. Included also in these reports are statistics from other sources relating to employment, payrolls, average weekly and hourly earnings, indexes of living costs, and the relation of retail milk prices to labor earnings.

The Pennsylvania reports on financial results of milk dealers' operations are unique. The authors do not know of any other milk control agency that publishes such information regularly.

The market administrator of the federal orders for Boston and secondary markets in Massachusetts compiles data and issues reports in much the

same way as do the administrators of the 3 markets for which price-fixing orders are in effect in New York State, as heretofore described. In all states of the region, data on farm production of milk, grain fed to cows, pasture conditions, yields of feed crops, and certain other matters relating to milk production, such as feed prices and the like, are compiled and published by the crop and livestock reporting service of the United States Department of Agriculture in cooperation with the states.

As stated, some of the milk control agencies have done comparatively little in the field of statistics and public information. On the whole, however, greatly improved statistical and information services on the supply and uses of milk, sales and consumption of milk, prices paid producers, retail prices of milk, and the like, have been an important by-product of milk control. The outstanding contribution of the milk control agencies to the improvement of statistics for the milk industry has been their compilation of practically complete data on supply and use of milk for specific marketing areas.

Interstate and Federal–state Cooperation

The complex of regulation of prices paid producers in northeastern milksheds

The northeastern states constitute the most densely populated section of the United States. The numerous cities and villages lie close together and their milksheds overlap. It is not unusual to find in the same community farms that supply milk to different markets which may lie in different states, and have different types of regulation.

The prices paid producers for milk supplied to the 3 largest markets of the region—Boston, Philadelphia, and New York—and to several secondary markets in Massachusetts—Merrimack Valley, Worcester, Fall River, and Springfield—are regulated by separate federal orders. Milk produced for a large number of other markets in the region is priced by state milk control orders. A third group of markets, including such important cities as Baltimore, Washington, Albany, Binghamton, and Syracuse, have neither state nor federal orders. The prices paid producers for milk supplied to these markets are determined by private negotiation, though they are greatly influenced by the price schedules established in federal or state orders.

As explained previously, 10 of the northeastern states—all except Delaware, Maryland, and West Virginia—have milk control laws. The milk control agencies of some states fix the prices paid producers in practically all markets. In other states, such as New York, only certain markets are regulated by state milk control orders.

As might be expected, the provisions of the several federal orders and of the many state orders which regulate prices paid producers in this region differ considerably, although there is much similarity. The milk is

not classified in the same way under the different orders, class prices and price differentials vary from market to market, and some orders provide for marketwide equalization while others do not. It is apparent that such differences in price schedules and other regulations, if not kept within rather narrow limits, would cause serious inequities among producers, stimulate uneconomic shifts between markets, dealers or cooperatives, and interfere with orderly marketing. A fair amount of collaboration among the responsible milk control agencies has kept this problem from becoming acute in most areas but there is much room for improvement.

Interstate cooperation

Concurrent or complementary orders. In the early years of state milk control and again after the Eisenberg decision in 1939, the state officials gave much consideration to the possibility of strengthening their system of regulation by issuing concurrent orders with uniform provisions affecting milk moved to a given market from 2 or more states.

In 1933–34, the milk control officials of New York and New Jersey were hopeful of establishing a joint arrangement for regulating the dealers' buying prices in the New York–New Jersey Metropolitan Area. This plan fell by the wayside, however, when the federal government refused to lend its support.

Plans for interstate cooperation in New England were discussed at a series of 3 conferences between 1939 and 1944. After the first conference in 1939, the milk control laws of New Hampshire, Massachusetts, and Rhode Island were amended to authorize the fixing of minimum prices to be paid producers for milk shipped out of state. Complementary orders were issued by the milk control agencies of Massachusetts and Rhode Island, regulating prices paid for milk shipped to the Providence market.[140] Later it was proposed that the milk control agencies of several states cooperate in regulating prices paid producers by dealers in the Fall River, Massachusetts, market, using a marketwide pool with a base-rating plan. It was discovered, however, that the laws of the several states were not sufficiently uniform to permit such a plan to be carried out.[141]

At a second meeting held in Boston early in 1941, this lack of uniformity was more fully explored. It was found that while New York apparently could establish only marketwide pools, Massachusetts could establish only individual dealer pools. Only New York among the several states represented had any power to appoint joint market administrators. Also the methods of financing milk control administration differed among the several states.

[140]Massachusetts still requires dealers who buy milk in Massachusetts for sale in Rhode Island to pay the minimum class prices fixed by Rhode Island orders. The milk control agencies of Massachusetts and Rhode Island collaborate in computing the minimum blended prices to be paid by such dealers who sell fluid milk in both states. The milk control agency of Massachusetts relies upon the Eisenberg decision as the basis of its authority to enforce this regulation. It has not been directly tested in court.

[141]Ann. Meeting Internatl. Assoc. Milk Control Agencies. Proc. 10, Appendix, p. 57. 1944.

The conference, therefore, recommended that the milk control laws be revised to provide the following substantially uniform administrative powers: (1) to hold joint hearings and appoint joint market administrators; (2) to require payment of an assessment to cover the cost of administering regulation of an interstate market; (3) to require joint calculation and announcement of producer prices; (4) to establish either dealer pools or marketwide pools; and (5) to require any base-rating systems to be operated uniformly within the states supplying a given market. Substantial revisions of the Connecticut and Massachusetts laws resulted, the Massachusetts law becoming a model in this respect through incorporating all changes deemed desirable for effectuating interstate cooperation.[142]

A third conference held in Boston in September 1944 passed several resolutions designed to aid in state regulation of the prices of milk moving from one state to another. No substantial strengthening of state control over interstate milk resulted, however, because Vermont, the principal source of interstate milk, did not see fit to participate in the proposed arrangements. Since then, additional secondary markets in Massachusetts have been placed under federal orders.

Interstate compacts. Another device that has received much consideration as a means of providing for effective regulation of the price of milk supplied to a market by more than one state, without surrendering the authority of the state governments, is the interstate compact. In effect, such compacts are agreements between 2 or more states, with the approval of Congress, for joint action to achieve a specified purpose. A frequent use for such compacts is to provide for the development of water supplies in which more than one state is interested. Another example is the Port of New York Authority, a public agency created by compact between New York and New Jersey, for the purpose of constructing and maintaining transportation facilities such as bridges, tunnels, bus terminals, and airports in the New York–New Jersey Metropolitan Area.

Some years ago a serious effort was made to organize by interstate compact a "Five-State Milk Authority" to regulate the prices paid for milk produced for the New York City market, as a possible alternative to the federal–state order program. Zimmerman and Wendell have given the following summary of this plan:[143]

> . . . while it may be granted that use of the device [i.e., interstate compact] for regulatory purposes will not serve as a substitute for national action, its potentialities as a means for establishing regional regulatory machinery should not be dismissed dogmatically, even in the instance of economic regulation. Illustrating this possibility was a recent although unsuccessful attempt to use a compact to establish producer prices for milk destined to the New York metropolitan market from producers in Massachusetts, Vermont, Pennsylvania, New Jersey, and New York. . . .

[142] In the following year, 1943, the Maine law was amended to remove provisions inconsistent with the power to fix prices paid producers by dealers for Maine milk being shipped to other states. See also *Proceedings of the Sixth Annual Meeting of the National Association of Milk Control Agencies*, p. 20, 1940.

[143] Zimmermann, Frederick L., and Wendell, Mitchell. The interstate compact since 1925, p. 26–27. Council of State Governments. 1951.

The proposed compact . . . would have established the "Five State Milk Authority," composed of the administrative officials of the compacting states who are empowered in their respective states to regulate and control certain aspects of the production and marketing of milk. This joint agency would have served as an instrumentality for fixing the prices paid to the dairy farmers for milk to be sold in the New York metropolitan marketing area, "when, as and if the present order of the United States Department of Agriculture including subsequent amendments thereto, regulating the handling of such milk, is terminated." In that event, the proposed authority was empowered to issue an order fixing such prices. The order was to be issued by majority vote in the authority, each state having one vote, but was to become effective only when the authority found that the order or amendment had been approved by two-thirds of the producers affected in all the states.

A market administrator was to be appointed to administer the order and issue rules and regulations subject to review by the authority. In other words, the compact would have provided an interstate agency to perform the functions of the present federal–state machinery in the control of prices for milk destined to the New York market area in the event the present federal order was terminated, and would have set up procedures for that purpose largely identical with those utilized under the present arrangement. The compact failed of ratification mainly because it was felt to be unnecessary in view of the effective operation of the existing marketing order. Nevertheless, it provides an illustration of the possibility of utilizing the compact device for the establishment of regional regulatory machinery in economic matters.

The reason given by Zimmermann and Wendell as to why the "Five-State Milk Control Compact" was not adopted was, no doubt, an important one. A further reason was the doubt entertained by many that the 5 states could agree upon a plan of regulation that would be fair and acceptable to all major groups of producers. Repeated efforts failed to get the New York legislature to authorize the commissioner of agriculture and markets to enter into such a compact, after the attorney general of the state had ruled that the commissioner is not authorized to do so under the present act.

The traditional resistance of New Jersey producers and their political representatives to plans for equitable sharing of returns for fluid sales and other uses of milk among all producers in the common production area for New York City and northern New Jersey markets also would be a serious obstacle.

A somewhat similar situation exists in New England. Massachusetts, with a preponderance of producers interested in local markets or in the relatively nearby Boston market, has found it difficult to agree upon joint action with Vermont and other states which provide the major part of Boston's milk supply. The Vermont legislature has authorized the milk control board of that State to enter into an interstate compact for regulating prices paid producers only at plants approved for the New York City market. It is said that the Vermont legislature, guided by the attitude of New England producer organizations, was unwilling to entrust the determination of producer prices and price differentials for the Boston milkshed to an agency in which the state of Massachusetts had an important voice. These two occurrences point to a serious weakness of interstate compacts for the purposes of regulating prices paid producers for milk

—namely, the lack of a strong agency such as the federal government to resolve conflicting interests among the states concerned.

Even if the states immediately concerned should agree upon a plan of regulation under an interstate compact, serious opposition might easily develop in Congress owing to conflicting sectional interests and viewpoints.

International Association of Milk Control Agencies. The state milk control agencies of the United States, together with the provincial milk control boards of Canada, have an organization that has helped to coordinate the policies and practices of the several state agencies and to encourage federal–state cooperation—the International Association of Milk Control Agencies. The original organization, called the National Association of Milk Control Boards, was formed in 1935, only a year or two after several of the states had established milk control boards or commissions. By 1941 several of the provincial milk control boards in Canada had become members and the present name was adopted. Practically all the state and provincial agencies that are authorized to fix milk prices are members of this organization.

Its main activity is an annual meeting at which matters of common interest to milk control officials are discussed. An annual meeting has been held each year since 1935, with the exception of 1944 and 1945 when travel was restricted by wartime regulations. In 1944 a limited meeting, designated an executive committee meeting, was held. In addition to members of milk control boards, administrators, and other key personnel of the member agencies, the annual meetings are attended by a considerable number of interested persons from the United States Department of Agriculture and state agricultural colleges, as well as persons associated with milk producers' associations and firms engaged in milk distribution. The annual meeting program usually extends over 2 or 3 days.

A discussion of legal issues and court decisions relating to milk control in the United States and in Canada has been a regular feature of these annual meetings of the milk control agencies. One or more papers on certain aspects of pricing fluid milk to dealers and producers, such as formula pricing, also are included in the program nearly every year. Pricing plans for seasonal adjustment of production have been discussed at several meetings. Trends in milk consumption and factors influencing the consumption of milk have been discussed also a number of times. In recent years, the subject of public relations from the viewpoint of both the milk control agencies and the milk industry has received a good deal of attention. Another topic that has appeared several times on the programs of the annual meetings is costs and efficiency in the distribution of milk.

At many of the meetings, the matter of cooperation among the milk control agencies of different states, as well as state and federal coopera-

tion, has been discussed. These discussions have sometimes led to later conferences among the milk control officials of several states, or to conferences between state and federal officials on particular problems of mutual concern.

From time to time, committees have been appointed to deal with particular problems such as interstate cooperation, federal–state cooperation, postwar planning, and statistics. During the period of World War II, the association took an active part in trying to work out with the federal authorities difficulties that arose from conflicts between wartime price regulations and the state milk control programs.

The association publishes an annual volume of proceedings, including a stenographic report of the discussions as well as the papers presented by scheduled speakers.[144]

The association operates on a very small budget. Its only source of income is annual dues at $25 per member. In 1953–54 dues were received from 24 member agencies, a total of $600. Less than $400 was paid out for all purposes. Some of the member agencies have provided essential services without compensation and members of the milk industry in the localities where annual meetings have been held have shared part of the expense involved.[145]

The international association has served a very useful purpose. The authors of this report believe it has an opportunity to perform a much greater service in the future. It should be more adequately financed and its activities as an educational and co-ordinating agency should be intensified. The membership should be expanded to include the agency responsible for administration of federal milk control programs, and the federal market administrators. Regional meetings or conferences might well be held to discuss, among other things, possible ways of bringing about more co-ordination of milk control programs and more collaboration between state and federal agencies.

The programs of annual meetings, as well as of the regional conferences, can be strengthened by giving more emphasis to discussions of milk control policies and of economic facts and principles involved in the determination of milk prices. Round-table conferences of groups interested in particular problems might well be combined with general sessions. Arrangements should be made for the broad participation of milk industry executives, economists, and lawyers, as well as interested persons from the agricultural colleges and the United States Department of Agriculture in the open sessions of both regional conferences and annual meetings.

[144]The proceedings are mimeographed rather than printed and have rather limited circulation. The annual volumes are available for reference at the offices of member agencies and in some agricultural college libraries.

[145]Kenneth F. Fee, director of the New York State Division of Milk Control, is entitled to much credit for the continued functioning of the International Association of Milk Control Agencies and for the publication of its annual volume of proceedings. Mr. Fee was elected secretary-treasurer of the association in 1937 and has been re-electd each year since then. He has now served in this position for 18 years without compensation. In nearly all instances, the president has held office for one year only.

Closed sessions limited to members could be held for consideration of matters of primary concern to milk control officials.

The educational value of the open meetings should be fully exploited through an effective press service and wide circulation of the proceedings or summaries of the important papers and discussions.

Cooperation between state and federal agencies

Complementary and competitive aspects of state and federal milk control programs. It is obviously in the public interest that the state and federal milk control programs should be complementary rather than competitive or in conflict with each other. The two programs do complement or supplement each other to a considerable extent. Milk prices have been stabilized by state milk control orders in many marketing areas not covered by federal orders. In this way state milk control has made it easier to administer federal orders successfully in adjacent areas. It is even more true that federal regulation of the larger markets, especially where marketwide pools are in effect, has helped to establish a firm foundation for the minimum prices fixed by state milk control agencies in the markets under their administration. Moreover, as explained later, there is much active collaboration between state and federal milk control agencies.

Nevertheless many regard the state and federal milk control programs as competitive, and sometimes as being directly in conflict with each other. Unfortunately this view is not without foundation in fact. At the outset, the Agricultural Adjustment Administration and the state milk control agencies contended with each other for the right to regulate milk prices in both interstate and intrastate markets. The milk control agencies of some states undertook to regulate directly or indirectly the prices paid producers for milk purchased in other states. And the Secretary of Agriculture issued marketing agreements and licenses for markets such as Detroit, Des Moines, Los Angeles, and San Diego, whose milk supplies were almost wholly intrastate.

It took several years to obtain a clear determination of the bounds of state and federal jurisdiction through court decisions. As stated previously, the general effect of the decisions was to give practically unlimited jurisdiction to the federal government and to seriously limit the authority of the states. The Secretary of Agriculture has continued to issue federal orders for markets that have no significant amount of interstate commerce in milk, and some state milk control agencies have strongly resisted the application of federal regulation to markets that have too much interstate traffic in milk to be effectively regulated by state orders. None of the intrastate markets for which federal orders have been issued are situated in the Northeast, but the extension of federal control to such markets in other parts of the country has generated a feeling of apprehension and distrust of the federal government on the part of state officials generally.

There has also been an undercurrent of competition between state and federal milk control agencies for favor and support on the part of producers and leaders of producers' organizations. In some instances, state agencies are believed to have fixed minimum prices to be paid by dealers for fluid milk at higher levels than were warranted by economic conditions, in an effort to give producers higher returns than producers received in adjacent milksheds regulated by federal orders.[146]

Legal provisions for cooperation of federal and state agencies. The Agricultural Adjustment Act of 1933 (the original legislation which authorized marketing agreements and licenses to regulate the marketing of milk and other farm commodities) contained no specific provision for cooperation with state agencies. Such a provision was added to the law in 1935, however, and also was made a part of the Agricultural Marketing Agreement Act of 1937, which provides among other things for the present system of federal milk orders. Section 610(i) of the Agricultural Marketing Agreement Act provides:

> The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to...obtain uniformity in the formulation, administration, and enforcement of Federal and State programs...to confer with and hold joint hearings with...[such authorities] and is authorized to cooperate with [them]; to accept and utilize...such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders...complementary to orders or other regulations issued by such authorities; and to make available to such State authorities records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture...[by handlers] shall be made available only to the extent that such information is relevant..., and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential...

Likewise, the milk control laws of all the northeastern states except Maine now provide authority to their control agencies to cooperate with the federal government with respect to uniform milk control for markets receiving milk from out of state.

Federal–state collaboration in New England. The milkshed of the Greater Boston market includes substantial parts of Maine, New Hampshire, Vermont, and Massachusetts, and also extends into New York and Connecticut. The milk control agencies of these states do not attempt to regulate the prices paid producers who supply milk to the Boston market nor to the secondary markets in Massachusetts that have federal orders. The state agencies continue to enforce other provisions of the milk control laws, however, with respect to dealers doing business in the federal order markets—such as licensing and bonding, and checking weights and tests.

[146]The insistence of some state milk control officials upon high prices for fluid milk and other provisions that federal officials were unwilling to support has been an obstacle to more extensive collaboration between federal and state milk control agencies. On the other hand, in the early years of state and federal regulation of milk prices, many persons who were active in the development and administration of federal milk control were unsympathetic to collaboration with the state agencies and did much to discourage it.

The Secretary of Agriculture of the United States has joined with the milk control commission of Massachusetts in a memorandum of understanding which provides for the exchange of information pertinent to the administration of their respective regulations. He also has similar agreements with the commissioners of agriculture of Maine, New Hampshire, Vermont, and Massachusetts. These agreements meet the requirements of the Agricultural Marketing Agreements Act with respect to the release of confidential information to state agencies.

There is said to be a good deal of active cooperation under these agreements. For example, the administrator of the federal orders for Boston and secondary markets in Massachusetts provides the state officials with information as to the quantities of milk received at federal order plants from producers in their respective states, as a basis for determining the required amounts of state license fees or bonds. He relies upon the state agencies to check weights and tests and may suggest from time to time that checks be made at certain plants.

When a federal order was first issued for the Lowell–Lawrence market in 1939, it was done in collaboration with the state milk control agency, and the federal administrator was also designated as the state administrator. Later, after the Wrightwood decision confirmed the authority of the federal government to regulate the prices of milk produced and sold within a state, the Massachusetts milk control agency played only a minor role in regulating producer prices in the Lowell–Lawrence (Merrimack Valley) area.

A rather interesting and significant example of federal–state cooperation in the field of milk control is found in the agreement for publishing cream price quotations in Boston. In 1942 the federal market administrator of Boston and the Massachusetts director of milk control signed a memorandum of understanding under which the weighted average price per 40-quart can of bottling-quality cream f.o.b. Boston was to be determined jointly by the 2 agencies twice a month. A revised agreement was signed in 1948. The weighted average price of cream so determined is used in formulas for pricing milk that is used in the manufacture of cream and other products under all federal orders for New England markets and under the orders of all New England states except Connecticut.

Joint federal–state regulation of the New York City market. The outstanding example of collaboration between federal and state milk control agencies in the entire country is found in the New York City market. In 1938 the United States Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets entered into a cooperative agreement which became the basis of a unified system of producer price regulation for this market.[147] In accordance with this agreement, joint

[147]This agreement is reproduced in the Appendix, pp. 126–128.

hearings are held, and complementary orders are issued by the federal and state agencies. These orders are administered jointly by a market administrator who is appointed by both the United States Secretary of Agriculture and the State Commissoner of Agriculture and Markets. Thus the state and federal milk control programs for the New York market are completely co-ordinated.

The federal authority necessarily is dominant, but the state milk control officials participate actively in joint hearings and in conferences on proposed amendments and other matters.

Need for federal–state cooperation in New Jersey. The main weakness of the joint federal–state milk control program for the New York City market is that it is too limited geographically. The extensive urbanized section of northern New Jersey, which constitutes a part of the natural market embraced in the New York – New Jersey Metropolitan Area, is excluded. For more than 20 years, the state milk control agency of New Jersey has attempted to regulate the prices paid producers for milk sold in this area, notwithstanding the fact that fully half the supply comes from Pennsylvania and New York and is not subject to price control by New Jersey.

Much of the milk supply for the northern New Jersey market comes from plants whose milk is priced by the New York milk order. A substantial portion comes from plants whose prices are not regulated by any state or federal order. The plants and farms that supply milk for northern New Jersey are intermingled with those that supply the New York City market.

To enable plants under the New York order to compete fairly with unregulated plants for the New Jersey market, that order requires handlers to account for fluid milk sold in northern New Jersey at only 20 cents per 100 pounds over the uniform price paid producers for all milk received. In 1954 this so-called Class I–C price averaged 95 cents per 100 pounds less than the Class I–A price which handlers were required to pay for fluid milk sold in the New York City market. Obviously the total returns to producers for fluid milk sold in northern New Jersey could be raised significantly by adopting an appropriate plan of federal–state cooperation for that area. There are strong differences of opinion as to whether this should take the form of a separate order for the northern New Jersey marketing area or of a comprehensive order covering the entire New York – New Jersey metropolitan district.

At the time this report was completed (June 1955), new steps were being taken toward solving this problem. After prolonged negotiations between the United States Department of Agriculture and the Office of Milk Industry in New Jersey, a plan of procedure has been announced for determining the form and extent of federal regulation of the prices paid by dealers for milk sold in New Jersey. It is reported that the 2 agencies have agreed upon a memorandum of understanding similar to

the one under which joint federal–state regulation of the New York City market is accomplished.[148] This agreement will become effective, however, only in the event that a definite plan of joint regulation for some marketing area in the state of New Jersey, either by itself or in conjunction with the New York or Philadelphia market, is adopted.

Federal–state relations in Pennsylvania. The Pennsylvania Milk Control Commission has continued to fix dealers' buying prices as well as retail and wholesale prices of milk in the Philadelphia market, even though a federal order was made effective there in 1946. Under the federal order, the price of Class I milk, as well as the prices of other classes, is computed each month in accordance with a prescribed formula. On the other hand, the state milk commission fixes definite minimum prices for fluid milk through hearing and amendment procedure. Whenever a federal hearing is held to consider possible changes in minimum prices or pricing formulas, the state commission usually holds a concurrent hearing. It also holds hearings at other times when there is no federal hearing. The class prices fixed by state orders differ from those fixed by the federal order, but ordinarily the differences are small. The Interstate Milk Producers' Association is said to have exerted a helpful influence toward co-ordinating the minimum class prices fixed by the state and federal authorities in the Philadelphia market. The milk control commission is said to believe that since it fixes minimum retail and wholesale prices at specified rates per quart, it should also fix dealers' buying prices so that the proper margins will be established for distributors.

The Pennsylvania Milk Control Commission and the United States Secretary of Agriculture have a memorandum of understanding which provides for the exchange of information between the state and federal agencies, but no agreement concerning joint hearings on complementary orders.

Logical division of state and federal responsibilities. Since the Seelig decision was announced in 1935, it has been clear that a state milk control agency cannot by itself effectively regulate the prices paid producers in a milkshed that lies in 2 or more states. The federal government can effectively regulate prices in such milksheds, and federal orders undoubtedly are the most practical means of regulation for large interstate markets such as Boston, Providence, New York, northern New Jersey, Philadelphia, Baltimore, Washington, and Pittsburgh.

There is much advantage, however, in having state as well as federal participation in programs of price regulation for markets that have significant amounts of interstate traffic in milk. The participation of state authorities in such programs helps to insure proper consideration of

[148] A memorandum of understanding between the United States Secretary of Agriculture and the New Jersey Office of Milk Industry which provides only for the exchange of information has been in effect for some time.

local conditions and viewpoints and to lessen the risk that cumbersome, slow, and unresponsive administration may develop. Joint federal–state regulation tends to be more flexible and more democratic than federal regulation without state participation.

There is general agreement that the federal milk orders have been administered competently and with much tolerance of differences in local conditions. This has been due in part to the influence of the milk producers' organizations which have worked closely with the federal authorities in developing the regulatory programs for the various markets. Direct participation of state milk control agencies in the administration of these programs can give added assurance that the regulations will continue to be responsive to local needs.

A possible alternative method of regulating producer prices in the milksheds of truly interstate markets is by regional milk control agencies established by interstate compacts. This method has yet to be tried, however, and, as stated previously, there appear to be serious obstacles to its adoption, especially for markets where the cooperation of several states is essential.

It has been demonstrated that the state governments can effectively regulate the prices paid by dealers in markets that have little or no interstate traffic in milk. The federal government also can regulate prices in such areas but there are good reasons why primary responsibility for such regulation should rest upon the states immediately concerned. It is recognized as a basic principle of good government in the United States that public services should be performed by the smallest unit of government capable of the task.[149]

Remote control tends to be inefficient and expensive, and less responsive to the needs of local situations than regulation by state or local agencies. Municipal and county governments obviously are not logical agencies for regulating the prices paid producers for milk, but the state governments are fully competent, except where interstate traffic is involved. It is as illogical to have milk prices in local marketing areas regulated by the federal government as it would be to have federal regulation of rates charged for local utility, telephone, and bus services. Federal taxpayers in the northeastern states may reasonably ask why they should be required to pay any part of the cost of regulating milk prices in such marketing areas as the Black Hills of South Dakota, or San Antonio, Texas.

Moreover, the extension of federal regulation to marketing areas that have little or no significance with respect to the national price structure for milk burdens the staff that is available for administration of the

[149]An interesting statement of the advantages and difficulties of federal and state regulation respectively was made by Herbert Forest, assistant director, Production and Marketing Administration, United States Department of Agriculture, in a paper presented at the 14th annual meeting of the International Association of Milk Control Agencies held at Winnipeg, Manitoba in September 1950 (Proceedings, pp. 95–101).

federal milk order program and lessens their ability to give prompt and adequate service to the important interstate markets.

It is true that only about one-third of the states have milk control laws. When producers supplying markets in other states wish to have their prices regulated by some government agency, they have the choice of trying to obtain the necessary state legislation or of applying for a federal order. The latter is usually the simpler procedure and the one likely to bring results more promptly. If the federal government responds to the appeal as it frequently does, even where the marketing area under consideration has no significant amount of interstate traffic in milk, the local problem is solved but a responsibility that properly rests upon the state has been transferred to the nation at large.[150]

The authors of this report believe it would be in the general public interest to amend the Agricultural Marketing Agreement Act so as to place certain limitations on the authority of the Secretary of Agriculture to issue federal milk orders for marketing areas that have little or no interstate traffic in milk. Specifically, they recommend that the Secretary of Agriculture be required, before issuing a federal milk order or amendment, to find that the marketing area to be regulated receives more than 5 per cent of its milk supply on an annual basis from states other than the one in which it is located, or that a competent agency of the state government is prepared to participate in a program of joint federal–state regulation of the market. It might also be provided that the secretary, before issuing a federal milk order for any market, make reasonable efforts to obtain the cooperation of the properly constituted authorities of the states involved in a plan of joint federal–state regulation.

Such a curb on the extension of federal regulation to intrastate markets would help to dissipate the feeling which now exists among state milk control officials that the federal government is a powerful competitor rather than a helpful associate. With this impediment eliminated, the possibilities of federal–state collaboration would be much improved. This change also would facilitate the development of an expanded and revitalized association of milk control agencies in which representatives of the United States Department of Agriculture could (and should) play an important part.

[150]Under present circumstances, the United States Department of Agriculture frequently finds itself under heavy pressure from milk producer organizations and members of Congress to undertake the regulation of relatively small intrastate markets. The trend toward federal encroachment upon the authority of the states is in no small measure due to the failure of such groups and their political representatives to insist that the state governments assume the responsibilities which properly belong to them.

Summary and Conclusions

Administrative organization

The several northeastern states have made use of a wide variety of organizational plans for administration of their milk control laws. In half the states that have such laws the milk control agency is in the department of agriculture. Only in New York, however, is the administration of milk control fully integrated with other activities of the agricultural department. Five of the 10 states with milk control laws have independent milk control boards or administrators, but in 2 of them the commissioners of agriculture are *ex officio* members of the boards.

Of the 10 milk control agencies in the Northeast, 6 are headed by part-time boards, 1 by a full-time commission, and 3 by individual administrators. The laws of some states provide for representation of certain groups, such as producers, milk dealers, and consumers, in the membership of milk control boards or commissions. This is a good plan for advisory boards or committees, but is not desirable in agencies that determine policies and decide administrative questions. Such responsibilities call for persons of judicial temperament, who are not devoted to any partisan interest.

It is evident that the executive functions of a milk control agency can be performed more efficiently and satisfactorily by a single administrator or director, than by a board or commission. Nevertheless, many of the state legislatures have been unwilling to entrust full authority in milk control matters to a single administrator, even where this was recommended by government reorganization commissions. There is a deep-seated feeling, apparently, that the quasi-legislative and quasi-judicial decisions should be made by multimembered agencies.

The authors of this report believe that one of the most desirable arrangements for milk control administration is to have a single director or administrator responsible to the state commissioner of agriculture, with an active advisory committee to consult on milk control policies and to act on appeals from the director's rulings. In this way the advantages of sharply focused executive responsibility may be had without undue risk of arbitrary dictatorial administration. Moreover, this set-up permits the price control function to be fully coordinated with related services, such as the bonding of milk dealers, checking milk weights and tests, fixing product standards and checking for adulteration, and the preparation of statistical information for the milk industry.

A part-time board, with executive responsibility centered in a director or executive officer, though less desirable than a single administrator, is preferable to a full-time commission. The latter tends to be more cumbersome, less efficient, and more expensive than other types of milk control agencies.

Financing milk control

In 1954, a little more than $1,500,000 was spent for the administration of state milk control programs in 10 northeastern states. The expenditures ranged from about $4500 in Vermont to $450,000 in New York, not including expenditures for administration of the joint federal and state orders for the New York City market. The cost of milk control administration does not exceed 4 cents per 100 pounds of milk, or 0.1 cent a quart, in any state, and in some the cost is less than 1 cent a hundredweight. Dealer license fees, assessments on milk handled by dealers, and penalties paid for violations, are the principal sources of income for meeting the costs of administering the milk control laws. In New Jersey and Pennsylvania, however, a considerable part of the cost has been met out of state funds from other sources. The practice in most states is to require that the special income from license fees, penalties, and assessments be deposited in the state treasury. Then the amounts required to meet the annual expenditures of the milk control agencies are appropriated for the use of those agencies. In a few states, however, the income from license fees, penalties, and assessments is directly available for use by the milk control agencies. The authors question whether this is good practice. They believe it is desirable that the annual budgets of all state agencies be subject to legislative review and approval.

Some states rely largely upon milk dealer license fees, and others mainly on assessments, to finance their milk control programs. The principal difference is that the license fees are paid once a year while the assessments are paid monthly. License fees, if more than nominal in amount, as well as assessments, are based on the quantity of milk handled by the various dealers. Dealers are called upon to pay most of the cost of administering the milk control programs because it is convenient to obtain the necessary income in this way. The ultimate burden of this cost probably rests, however, mainly on consumers, and to some extent on producers.

Restrictive licensing

In New York and Virginia, licensing is used as a means of restricting the entry of new firms into the business of handling or distributing milk, also to limit the kinds of operations carried on by each dealer and the area in which he may operate. Since 1934 the New York law has authorized the commissioner of agriculture and markets to refuse to grant a license on the ground that the market in which the applicant intends to do business is already adequately served, and that the issuance of the license would tend to cause destructive competition. This authorization has been interpreted by a succession of commissioners as a mandate to grant relatively few new licenses or extensions of old licenses. The restrictive policy goes to the point of determining whether a dealer or cooperative may operate a milk receiving plant at a new location, or extend service to customers beyond the limits of the area previously specified in the license.

This policy of restrictive licensing was adopted in 1934 following a recommendation of the state milk control board, which expressed the belief that the efficiency of milk distribution could be increased by restricting the entry of new dealers and plants. The policy has been actively supported by dealers and cooperatives who naturally wish to be protected from new competition.

Restrictive licensing helps to prevent price wars by excluding new distributors who might try to gain a foothold by selling at cut prices or by aggressive merchandising of one kind or another. It would be more logical, however, to instruct the milk control agency to see that all dealers, new or old, refrain from practices that tend to impair healthy competition and the long-run interests of producers or consumers.

The authors of this report doubt that restrictive licensing results in more efficient distribution of milk. It tends to protect those firms and plants already in the field, regardless of their efficiency. Moreover, there is no assurance that savings made through less duplication of facilities and services will be passed on to producers or consumers. This is true especially since the exclusion of new firms and plants lessens the competitive pressure on dealers and cooperatives to improve service and quality and to reduce their margins and costs. The exclusion of new firms and plants makes it easier for dealers in the less competitive markets to maintain prices and margins that are higher than necessary to cover the costs of efficient distributors.

The policy of restricting distribution areas is in direct conflict with economic forces which now give encouragement to the expansion of these areas for more efficient operation of plants and distribution systems. The number of licensed dealers and plants has decreased in all states. It is not apparent that restrictive licensing has caused a greater reduction in New York and Virginia than would have occurred otherwise, but there undoubtedly has been less turnover because of this policy.

Enforcement

For various reasons, many of the state milk control agencies were unable to obtain satisfactory compliance with their fixed minimum prices and other regulations during the early years. In some instances, the orders were so widely violated that dealers who complied fully with the regulations were placed in a very difficult competitive position.

More recently, compliance with state milk control orders has greatly improved. The authority of the milk control agencies has been clarified by many court decisions. Massachusetts and some other states discontinued the fixing of producer prices in markets that received much out-of-state milk. Federal orders, mostly providing for marketwide equalization, are now in effect for a number of the larger markets that depend upon out-of-state supplies. These orders help to stabilize milk prices

throughout the region and make it easier for the state milk control agencies to enforce their orders.

In some states, at least, the milk control programs are now strongly supported by milk producers' organizations that are prepared to give effective aid in enforcement when necessary. Connecticut, New York, and New Jersey have ceased to fix minimum wholesale and retail prices and have thus escaped from their earlier difficulties with the enforcement of such prices.

Industry participation. Enforcement really begins with the preparation of milk control orders and amendments. Regulations must be clear in meaning and reasonable in their application if they are to be generally obeyed. Formal or informal arrangements for giving representatives of the milk industry an opportunity to review and criticize proposed orders and amendments before they are promulgated, help to eliminate ambiguities and inconsistencies as well as provisions that would tend to cause undue hardships or inequities. This procedure also insures more industry goodwill and support for the orders.

In Pennsylvania, the law requires that conferences be held on proposed orders or amendments before they are promulgated. In New York, milk control orders can be proposed only by a producers' bargaining agency, and amendments to an existing order can be proposed only by a producers' bargaining agency or a distributors' bargaining agency. Although not required by law, an opportunity for oral argument on proposed orders or amendments also is provided when controversial issues are involved. In Connecticut, the Wholesale Milk Producers' Council is an official agency authorized to advise the milk administrator on policies.

Education and publicity are now recognized as important elements of a good milk control enforcement program.

Auditing. In all states that have milk control laws, dealers are required to keep records and to file monthly reports of their receipts and disposition of milk and cream. In some states, these reports and records are checked regularly by trained examiners of the milk control agency to insure against inaccurate or fraudulent reporting of the quantities of milk used in the various classes. Careful auditing of dealers' utilization reports is especially important in markets where dealers handle large quantities of surplus milk and where there is a wide difference between the prices fixed for fluid milk and milk for manufacturing. The auditing programs of some states are clearly inadequate.

Enforcement methods. The usual procedures for dealing with persons or firms that have violated milk control regulations are:

Administrative penalties—Usually agreed to by violators to avoid unfavorable publicity and the expense of litigation.

Proceedings to revoke the milk dealer's license—Usually the next step when the violator fails to pay the administrative penalty. The laws of most states specifically authorize the revocation of a license for any violation.

Injunction proceedings—To obtain a court order directing the violator to comply with the specified regulation. This method is particularly useful in obtaining compliance by persons who are not licensed.

Criminal action—In most states, any violation of the milk control law or of a milk control order is a misdemeanor punishable by a fine, imprisonment, or both. Criminal proceedings against violators of the milk control laws have been instituted in relatively few instances.

Appeals. The milk control law of each state provides for appeals from rulings of the milk control agency. Some states as well as the federal government require that an aggrieved party must request an administrative review of the objectionable regulation or decision before seeking relief in court. The problem is to protect those who are subject to the milk control laws from arbitrary or discriminatory acts of the milk control agency without opening the way to such extensive demands for review that the functioning of the agency would be seriously impaired.

Legal services. Competent legal counsel is essential for good enforcement of milk control regulations. Such counsel is needed in the preparation of orders, in conducting hearings, and in other administrative procedures, as well as in handling cases that go to court.

The most common arrangement for legal services on behalf of the state milk control agencies is for those services to be provided by the attorney general's office. In some instances, this has worked very well, but often it is unsatisfactory. The danger is that there will not be close enough collaboration between the two agencies, and that the legal work of milk control will not be regularly assigned to a lawyer who has become a competent specialist in this field.

Legal issues and court decisions

Constitutionality of price-fixing. When the milk control laws were first enacted, there was no assurance that the courts would recognize the fixing of milk prices as a legitimate activity of the state or federal governments. The production, handling, and distribution of milk were not generally regarded as being in the class of public utilities. Many well-informed persons insisted that the fixing of milk prices violated the "due process" clause of the fourteenth amendment to the federal constitution. Others believed that the courts might uphold this new type of regulation as a temporary emergency measure to protect dairy farmers from economic disaster and to forestall possible shortages or interruptions of the supply of wholesome milk for consumers. It was not generally believed that the courts would approve of the fixing of milk prices as a permanent function of the state or federal governments.

This basic constitutional issue was settled quite promptly. In 1934, the Supreme Court of the United States, though sharply divided, declared in the case of Nebbia v. New York that:

...there is no closed class or category of businesses affected with a public interest.... Upon proper occasion, and by appropriate measures, the states may regulate a business

in any of its aspects, including the prices to be charged for the products or commodities it sells. . . . The constitution of the United States does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people. Price control, like any other form of control, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . .

Thus the Court indicated that the power of the states to regulate milk prices was not limited to temporary emergency situations. Later, in the case of United States v. Rock Royal Cooperative, Inc., the Supreme Court said: ". . . the authority of the Federal Government over interstate commerce does not differ . . . from that retained by the states over intrastate commerce."

Delegation of legislative power. Since it was impractical for the state legislatures and for the federal congress to specify in detail the prices to be paid or charged for milk, this responsibility was delegated to milk control boards or similar agencies. The laws provide rather indefinite standards for the determination of prices. The milk control agencies also are given much latitude in deciding on such matters as the number and boundaries of marketing areas, and whether lower prices should be fixed for milk sold at cash-carry stores than for milk delivered to the home.

With some exceptions, the courts have shown a willingness to approve of the delegation of such broad quasi-legislative powers to the milk control agencies, and have not required that the laws give specific rather than general directions for the determination of prices. In the case of Rieck-McJunkin Co. v. Milk Control Commission, the Pennsylvania Supreme Court declared that ". . . the legislature has not delegated its power to make law, but has delegated power to determine facts and apply the intention of the legislature to the facts thus determined."

In the case of United States v. Rock Royal Cooperative, Inc., the United States Supreme Court found no objection to a requirement of the Agricultural Marketing Agreement Act that a proposed order or amendment be approved by a two-thirds vote of producers before being made effective. Nor has there been any successful challenge of requirements of the New York Milk Control Law (in effect since 1937) that a price-fixing order be issued only in response to a petition from a producers' bargaining agency, and after approval by a two-thirds vote of the producers affected.

Jurisdiction of state and federal governments. From the beginning, the state milk control agencies labored under the handicap of serious doubt as to their power to fix the price of milk that was involved in interstate commerce. New York and some other states attempted to regulate indirectly the prices paid for out-of-state milk. Within 2 years, however, the United States Supreme Court, in the case of Baldwin v. Seelig, ruled that any such barrier to traffic between the states was prohibited by the interstate commerce clause of the federal constitution. Denial of the right of the state milk control agencies to interfere with the prices paid for

milk brought into their principal markets from other states, greatly weakened the milk control programs of such states as Massachusetts, Rhode Island, New York, New Jersey, and Pennsylvania.

On the other hand, the United States Supreme Court has upheld the right of a state milk control agency to fix and enforce minimum resale prices of milk within the state, without regard to source. In the case of Highland Farms Dairy, Inc. v. Agnew, the Court declared that the minimum resale prices fixed by the Virginia Milk Commission applied equally to milk produced and pasteurized in Virginia and to that brought into the state from plants in the District of Columbia. This legal right to regulate resale prices of milk, whether produced within or without the state, has been relied upon very heavily by the milk control agencies of Rhode Island, New Jersey, Pennsylvania, and Virginia, in their efforts to stabilize prices in markets receiving substantial out-of-state supplies.

When the fixing of milk prices by the state and federal governments was first undertaken, there was perhaps as much doubt of the authority of the federal government to regulate the prices of milk produced and sold within the same state as of the authority of a state milk control agency to price milk that was involved in interstate commerce. This doubt was partially dispelled by a 1942 decision of the United States Supreme Court in the case of United States v. Wrightwood Dairy Co. This dairy distributed, in the area regulated by a federal order for Chicago, milk that was produced exclusively in the state of Illinois, and therefore not directly involved in interstate commerce. The Court held, however, that Wrightwood must comply with the order, asserting that the reach of federal power over interstate commerce "...extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

Two more recent decisions of federal district courts in Ohio point toward practically unlimited jurisdiction of the federal government in regulating the prices of milk produced and sold within a state. In these cases, which were not appealed, emphasis was placed upon competitive relationships between milk that is distributed locally and that which enters into interstate commerce. The courts apparently accepted the view that in order to stabilize the prices of milk used in producing manufactured dairy products the federal government may have to regulate the prices paid for market milk in areas that receive practically no milk from out of state.

Blending and equalization. The authority of the state and federal governments to require the blending, pooling, or equalization of prices paid producers has been challenged in a number of hard-fought cases in the courts. Those who objected to this type of regulation insisted that it violated the fourteenth amendment to the federal constitution by depriving them of their private property without due process of law. The courts,

however, have generally upheld both state and federal orders that require either blending by individual dealers or marketwide equalization.

Some of the litigation on blending arose from efforts of the milk control agencies to force producer-dealers to include their own production in computing the blended prices paid other producers from whom they bought milk. In a Connecticut case, the Superior Court of Hartford County upheld the regulation, saying: "These plaintiffs are not being deprived of property without due process of law. They are required to share with other producers the vicissitudes of a calling common to a group for the mutual welfare of its members and the interest of the public."

In 1939, New York State's highest court reversed the decision of a lower court which found the provision for marketwide equalization an unconstitutional delegation of power and in conflict with the due process clause of the fourteenth amendment. Later the requirement that the milk of producer-dealers be included in the marketwide pools also was upheld. In Oregon, the right of the milk control board to exempt producer-dealers from equalization was denied in a decision of the highest court of that state.

In its decision in the Rock Royal case, the United States Supreme Court said: "The pool is...only a device reasonably adapted to allow regulation of the interstate market...", and that: "It is ancillary to price regulation, designed...to foster, protect, and encourage, interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing."

The New York State Guernsey Breeders' Cooperative Association insisted that either the milk delivered by its members be exempt from equalization or that they be paid a special differential from the pool. It was claimed that Guernsey milk possesses characteristics which distinguish it from other milk and cause distributors to accord it a preference for fluid use. After very extensive litigation, this issue was decided against the Guernsey organization in the Supreme Court of the United States and also in the New York State Court of Appeals.

Cooperative payments. In the case of Brannan v. Stark, the United States Supreme Court, in a 4-to-3 decision, ruled against the validity of a provision of the federal order for Boston which authorized payments from pool funds to cooperative associations of producers for services that were presumed to benefit all producers. The Court said that such payments were not authorized by the Agricultural Marketing Agreement Act. A comparable though technically different provision of the federal and state orders for the New York City market also has been challenged in court. A federal district court upheld the regulation but the decision has been appealed.

Restrictive licensing. The highest court of New York State has repeatedly upheld that provision of the milk control law which authorizes

the commissioner of agriculture and markets to refuse to grant new milk dealer licenses or to extend existing licenses, on the ground that the market is already adequately served. In the case of *Williams v. DuMond*, the Court stated: "When the Legislature places any business under regulation, with the requirement of a license...it necessarily contemplates the possibility of a monopoly in those areas in which a single license is granted."

In another case, the same court decided unanimously that the commissioner had the right to refuse permission to the Grandview Dairy to construct and operate a new country milk receiving plant. Again the reason given for refusing to grant the dealer's request was that adequate facilities were already available in the area, and that the opening of another plant would tend to cause destructive competition. In the case of H. P. Hood & Sons v. DuMond, however, the Supreme Court of the United States ruled in a 5-to-4 decision that the commissioner's refusal to extend Hood's license for the operation of a country milk receiving plant to supply markets in New England violated the commerce clause of the federal constitution.

Procedure for fixing prices. Because the milk control laws give broad and rather indefinite authority to the milk control agencies, the courts have been called upon many times to interpret the intentions of the legislative bodies and to determine how various provisions of the laws should be applied in particular instances. This is especially true with respect to the determination of prices. Some of the judges who have heard such cases have taken the position that the milk control agencies may do almost anything within reason that is not definitely forbidden by the statute or by the federal or state constitutions. Others have insisted that the administrative agencies adhere strictly to the functions and methods specifically authorized, and have sometimes substituted their own judgment for that of the milk control officials.

One of the most significant court decisions relating to this matter was given by the Pennsylvania Supreme Court in the case of Colteryahn Sanitary Dairy v. Milk Control Commission. In that decision, the Court made a number of constructive suggestions for the conduct of hearings and the issuing of milk control orders (see page 75).

One of the procedural issues relating to price-fixing orders that has occupied the attention of the courts is whether information or facts not presented at a hearing may be considered by the milk control agency in making a decision. The decisions bearing on this issue are not uniform but the general principle seems to be that every effort should be made to obtain in evidence at a hearing all pertinent and important facts relating to the issues under consideration. Only in this way can full opportunity be given for cross-examination and for the presentation of opposing testimony by those who disagree. Some courts have recognized, how-

ever, that facts known to the milk control agency but not presented at a hearing inevitably will influence their decisions.

Early in the history of milk control, a New York dealer challenged a price-fixing order on the ground that the margin between the minimum prices he was required to pay producers and the minimum resale prices was insufficient to cover his costs. In the case of Hegeman Farms Corp. v. New York Milk Control Board, the United States Supreme Court declared that the board was not obligated to fix prices that would assure fair returns on the investments of all dealers and said: "The fourteenth amendment does not protect a business against the hazards of competition."

The Supreme Court of Virginia has ruled in two separate cases that the milk commission of that state is not authorized to fix either a lower price for cash-carry sales at stores or a higher price for milk sold in paper containers than for milk sold in other ways. In one of these decisions, the Court also declared that the commission must fix maximum prices if minimum prices are fixed. The courts of other states have not interfered with the fixing of lower prices for milk sold on a cash-carry basis than for milk delivered, but have generally ruled against extra charges for milk sold in paper containers.

Judicial interference with administrative functions. It is, without question, a proper function of the courts to halt any activity of the milk control agencies that is inconsistent with the federal or state constitutions. It is also their responsibility to interpret the meaning of various provisions of the milk control laws in the light of the general system of laws and court decisions, and to protect those subject to the milk control laws from arbitrary, capricious, or discriminatory rulings.

In most instances the courts have limited themselves to the performance of these functions in dealing with milk control cases. The judges have usually recognized that the milk control officials, with their intimate knowledge of milk industry problems, are better qualified to decide administrative questions in their special field. Chief Justice Kephart of the Supreme Court of Pennsylvania emphasized this principle in a decision that was critical of a lower court for assuming responsibilities which more properly belonged to the milk control agency. He warned that if the lower court persisted in such a course, the usefulness of the milk commission would be at an end and the court itself would become the price-fixing body for the milk industry.

Where this principle, that quasi-legislative decisions should be made by the milk control agencies rather than by the courts, has been violated, it has usually been due to improper or inadequate legislation.

Services related to milk control

The licensing and bonding of milk dealers, checking of weights and tests, enforcement of product standards, and the preparation of statistical

reports on the supply, uses, and prices of milk were functions of the departments of agriculture in the northeastern states before the milk control laws were enacted. Efficient and successful administration of the milk control laws requires that the performance of these related services be coordinated rather closely with price control. Consequently, the responsibility for such services has been transferred in part to the milk control agencies.

The reports that dealers are required to make to the milk control agencies are a particularly fertile source of useful statistics. They provide the basis for practically complete summaries of milk supplies, fluid sales, and other uses of milk in definite marketing areas.

Interstate and federal–state cooperation

The northeastern states have a great complex of state-regulated, federally regulated, and unregulated markets whose milksheds overlap. Differences in the provisions of orders for neighboring markets, as well as the existence of regulated and unregulated or partially regulated markets in the same general area, give rise to serious problems. Different dealers in the same market, unless it is federally regulated or has no out-of-state supply, have different product costs, an unsound competitive situation which tends to cause violation of minimum price orders. Neighboring producers who supply different markets receive different prices, with resulting dissatisfaction and abnormal shifting from one outlet to another—sometimes disrupting plant supplies and cooperative affiliations. And producers who supply markets regulated by orders that provide for marketwide pools bear a disproportionate share of the lower returns for the reserve supply of milk for all markets of the region.

Such difficulties could be avoided or minimized to a large extent through proper coordination of the milk control programs of the several states and of the federal government.

Interstate cooperation. The state milk control agencies have attempted to cooperate in several ways. Some years ago, several New England states as well as New York and New Jersey sought to coordinate and strengthen their milk control programs by issuing concurrent orders applicable to milk produced for a given market in two or more states. Comparatively little was accomplished along these lines, however, because there was not full agreement among the states concerned, and much doubt as to the power of any state to regulate the prices paid for milk that was moved to markets in other states.

Efforts have been made to establish an interstate compact among the states of the New York City milkshed as an alternative method of regulating the prices of milk produced for that market. So far the objective has not been achieved. One reason is that producers have been fearful of losing the benefits of present federal and state orders for this market, without having an adequate substitute. There is considerable doubt also

whether Congress would approve such a compact to take the place of federal regulation.

The state milk control agencies are members of the International Association of Milk Control Agencies at whose annual meetings problems of mutual concern are discussed. These meetings have helped to bring about more coordination of milk control policies and procedures. An annual volume of proceedings is issued, which, though not widely distributed, provides much useful information on milk control problems and related matters. The association operates on an extremely small budget, most of the personal service being contributed without charge.

The authors of this report believe that the membership of the association should be expanded to include the federal milk control agencies, that steps should be taken to provide a more adequate income, and that regional meetings open to industry representatives and other interested persons should be held to consider milk control policies and problems of special concern in different parts of the United States and Canada.

Cooperation between state and federal agencies. Considerable progress has been made in arranging for the cooperation of federal and state agencies on certain aspects of milk control administration. Memoranda of Understanding have been signed by the federal Secretary of Agriculture and the milk control or agricultural officials of several northeastern states, authorizing the exchange of confidential information. A Memorandum of Understanding between the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets, providing for a plan of joint federal-state regulation of the prices paid for milk supplied to the New York City market, has been in effect since 1938. A similar agreement was concluded recently between the Secretary of Agriculture and the Director of the Office of Milk Industry in New Jersey, but as yet it has not been implemented by the issuance of complementary orders.

Notwithstanding these favorable developments, the state and federal milk control programs have, to a considerable extent, been competitive rather than complementary. Some of the states have tried to regulate without federal cooperation (and with only partial success) the pricing of milk in markets supplied by more than one state. Conversely, the federal government has issued milk control orders for a number of markets outside the Northeast that have no significant amount of interstate traffic in milk. Largely because of this, state milk control officials have regarded the federal government as a powerful competitor rather than as a helpful associate.

The authors of this report believe that any state concerned with the regulation of milk prices in markets which receive much out-of-state milk should participate in a plan of joint federal–state regulation. On the other hand, they believe it is not in the general public interest for the federal government to regulate markets that have no significant amount of inter-

state traffic in milk, unless it is done in cooperation with state agencies. The authors suggest that the Agricultural Marketing Agreement Act be amended so as to relieve the Department of Agriculture of pressure to issue milk control orders for intrastate markets. It should be made a requirement of the act that before issuing any milk control order, the Secretary must find either: (1) that at least 5 per cent of the supply is received from out of state, or (2) that a state milk control agency is prepared to participate in a plan of joint federal–state regulation.

This policy would be in keeping with the generally accepted principle that public services should be performed by the smallest unit of government capable of the task. Adoption of this policy also would encourage more general cooperation between the state and federal milk control agencies. Moreover, it would enable the limited personnel available for administration of the federal milk orders to give more adequate attention to the problems of the important interstate markets.

Appendix

MEMORANDUM OF THE PRINCIPLES OF COOPERATION TO BE OBSERVED IN THE FORMULATION AND ADMINISTRATION OF COMPLEMENTARY ORDERS FOR MILK FOR MARKETING AREAS LOCATED WITHIN THE STATE OF NEW YORK TO BE ISSUED CONCURRENTLY BY THE SECRETARY OF AGRICULTURE AND THE COMMISSIONER OF AGRICULTURE AND MARKETS

Dated: August 26, 1938

In order that the policies of cooperation embodied in Section 10(i) of Public Act No. 10, 73rd Congress, as amended and as reenacted by the Agricultural Marketing Agreement Act of 1937, and Section 258-n of Article 21 of the Agriculture and Markets Law, State of New York, may have their fullest possible effect in spirit and in practice, the following principles of procedure are hereby mutually approved as the basis of cooperation in marketing areas in the State of New York in which Federal and State complementary and concurrent orders, rules or regulations may hereafter be issued.

Joint Procedure

It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders regulating the acquisition of milk by handlers and milk dealers who market or in any manner participate in the acquisition, processing, or distribution of milk to be marketed in such marketing areas as may be defined in such complementary and concurrent Federal and State orders, and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint and concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders.

Uniform Provisions

The Secretary of Agriculture and the Commissioner shall, in their respective complementary and concurrent orders for marketing areas within the State of New York, establish (a) identical classifications of milk to which comparable prices, inclusive of

authorized assessments, fees, adjustments, or deductions, shall apply, and (b) identical differentials or other terms or conditions of purchase and acquisition and payment to the extent authorized by the respective Federal and State statutes. In the event any method of payment to producers or associations of producers is prescribed by both orders applicable to the same marketing area, provisions for such method shall be so drawn in the respective Federal and State complementary and concurrent orders that the plan of uniformity for all producers or associations of producers supplying the market will not be altered in any way by the fact that the acquisition of such milk or the payment therefor is deemed to be governed by either order. The contents of any such order issued by the Secretary of Agriculture or by the Commissioner shall be limited to terms, conditions, and prices relative to the acquisition of milk by handlers and milk dealers, and accounting and settlement therefor, and the administration thereof.

Exchange of Information

It shall be the policy of the Secretary of Agriculture and the Commissioner to exchange all information essential to the proper administration of their respective complementary and concurrent orders and relative to transaction within the regulatory jurisdiction of such authorities. The confidential nature of information so exchanged shall be subject to the requirements of Section 10(i) of Public No. 10, 73rd Congress, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, and, on the part of the Secretary of Agriculture, to the provisions of the Agriculture and Markets Law, State of New York, and in either case subject to such rules and regulations as may be issued under the respective Federal and State statutes.

Administrative Agency

The Secretary of Agriculture and the Commissioner shall utilize one and the same agency for the administration of each respective complementary and concurrent order, which shall be a market administrator who is approved and designated as such by both the Secretary of Agriculture and the Commissioner. The duties of the market administrator shall be confined to the administration of the orders pursuant to which he has been designated, and, while serving in such capacity, the market administrator and such personnel as may be employed by him shall not be utilized by either the Secretary of Agriculture or the Commissioner, during the period of employment, in the administration of any other orders or of the terms or conditions in any other orders not common to both. All employees shall be under the exclusive direction of the market administrator and may be utilized to carry out any of his duties. Nothing herein shall be deemed to prevent the Secretary of Agriculture or the Commissioner from designating the same person as the market administrator of complementary and concurrent orders issued for each of two or more marketing areas within the State of New York.

Finances

Expenses incurred in the maintenance of the market administrator's office shall be paid by assessments or deductions made and collected for this purpose pursuant to the respective complementary and concurrent orders applicable to the same marketing area. Disbursements from the funds so collected shall be at the direction of the market administrator, subject to the audit of both Federal and State authorities. Such assessments or deductions shall be identical in rate and shall be made in such a way that uniformity under the Federal and State orders in returns to producers and gross cost to handlers or milk dealers, inclusive of such assessments or deductions as the case may be, shall not be affected by the manner of making the assessment or deduction under the respective orders.

Administrative expenses shall constitute only those expenses incurred in the performance of the duties of the market administrator as set forth in the respective com-

plementary and concurrent orders applicable to a given marketing area as distinguished from overhead incurred by the Federal or State governments in the administration, supervision, and enforcement of such orders.

Administration

The market administrator designated under the complementary and concurrent orders shall use a uniform system in securing periodical reports from handlers and milk dealers, in auditing and verifying the same and in making any and all necessary corrections or adjustments. The general policy of cooperation shall be understood to extend to the interpretation or application of uniform or similar provisions. It is also understood that whatever periodical reports are required to be made by the market administrator to the respective central offices of the Federal and State governments, shall be uniform. Likewise the books, records, and accounts of the market administrator shall be open for inspection and audit to both the Secretary of Agriculture and the Commissioner.

Enforcement

The failure of any person to comply with any of the provisions of a complementary and concurrent order shall be regarded as of mutual concern, and the respective governmental authorities shall be kept fully advised in regard thereto so that a cooperative effort may be made to decide upon a proper course of action. In all matters affecting enforcement of their respective complementary and concurrent orders applicable to the same marketing area, the Secretary of Agriculture and the Commissioner will undertake, both severally and jointly, to utilize all means at their disposal for the effective enforcement of such orders.

Interstate Cooperation

In recognition of a common interest in the regulation of marketing conditions on the part of duly constituted authorities of the State in which the marketing areas are located and those of the States from which substantial quantities of milk flow to such marketing areas, and with a view to encouraging coordination of effort in the regulation thereof, the Secretary of Agriculture and the Commissioner will follow the policy of inviting consultation with such authorities from time to time in matters of mutual interest arising in connection with the formulation, modification, or administration of complementary and concurrent orders applicable to marketing areas within the State of New York.